02-1915

SUPREME COURT OF WISCONSIN
COURT OF APPEALS (DISTRICT I) CASE NO. 02-1915
CIRCUIT COURT CASE NO. 00-CV-2571

TAMMY KOLUPAR,

Plaintiff-Appellant-Petitioner,

v.

WILDE PONTIAC CADILLAC, INC. and
RANDALL THOMPSON,

Defendants-Respondents.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER

LISKO & ERSPAMER, S.C.
Attorneys for Plaintiff-Appellant-Petitioner,
Tammy Kolupar
By: Attorney Paul M. Erspamer
State Bar No. 1010824
Sunset Plaza, Suite 201
W229 N1433 Westwood Drive
Waukesha, Wisconsin 53186
(262) 896-2090

Appeal From the Order of the
Milwaukee County Circuit Court,
the Honorable Thomas R. Cooper,
presiding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Wisconsin Statutes

Other Authorities

SUPREME COURT OF WISCONSIN

TAMMY KOLUPAR,

Plaintiff-Appellant,

v.

WILDE PONTIAC, CADILLAC, INC. and RANDALL THOMPSON,

Defendants-Respondents.

Appeal No. 02-1915

Trial Court
Case No. 02-CV-002571

STATEMENT OF THE ISSUES PRESENTED

1. A consumer prevailed on an automobile dealership fraud case by accepting defendant's first offer: a statutory offer of judgment, with costs and fees to be decided by the court. Did the lower court erroneously exercise its discretion by failing to apply and consider the correct legal standard?
Answered by the trial court: No.
Answered by the court of appeals: No.

2. Whether the lower court erred in failing to make a reasoned determination of litigation expenses allowable to the prevailing party in a motor vehicle dealership fraud case, where the court lumped costs and fees together, without specifying what amounts were allowable for each (where costs and fees are allowed by statute) whether the lower court should have utilized the "lodestar" method of calculating fees, and whether it should have adjusted the hourly rate of plaintiff's attorneys to account for the delay in payment, both as mandated in federal cases by the U.S. Supreme Court?
Answered by the trial court: No.
Answered by the court of appeals: No.

3. Whether the lower court erred in delegating fact-finding and decision-making to a former discovery referee, summoned as a defense witness, as to the merits of awarding reasonable attorneys fees and costs to the prevailing litigant, where the referee lacked foundation and knowledge of the case, made no specific findings, and never conducted fact-finding hearings under §805.17(2)?
Answered by the trial court: No.
Answered by the court of appeals: No.

STATEMENT OF THE CASE

A. DEALERSHIP TRANSACTION

This case arose because Wilde Pontiac and its sales manager, Randall Thompson, orchestrated a fraudulent trade-in deal at Wilde's Waukesha showroom on March 30, 1994. Wilde's Pontiac New Car Sales Manager, Thompson, created an impression of legitimacy from his title and his access to Wilde's forms and equipment to induce 18-year-old Tammy Kolupar to "trade" her 9-month-old 1993 Sunbird for his own 1986 Mercedes Benz, under the guise of a dealership sale.[1] He paid $5,750.00 for the Mercedes and sold it for $8,600.00 (R. 102,2). At the same time, the dealership's used car manager approved the transaction, acquiring Kolupar's one-year-old Pontiac Sunbird and selling it at a price greater than its cost. (R. 102,14)(App. 13). Thompson told her (R. 102, 1) and showed her documents (R. 104, Exhs. "C" and "D")(App. 12, 13)stating the transaction was a "trade-in" with Wilde, netting her a "trade" value of $8,995.00. Both statements were false. There was no trade-in because Wilde did not own the Mercedes, and Kolupar was never credited with $8,995.00 from the Sunbird sale. Word of Thompson's deal went through the dealership

---

[1] Dexter White, a Wisconsin Department of Transportation dealership compliance officer at that time, referred to this practice as "curbing cars." (R. 130,9). Thompson's superiors did nothing to discourage the practice. (R. 102,3)(App. 13).

"like wildfire," according to the used car manager. (R. 99, 2). The Mercedes was a mechanical nightmare for Kolupar (R. 102,3)(App. 13). The odometer ran intermittently, mis-stating the mileage. The axle was bent. The brakes immediately needed repairs. The vehicle overheated and stalled in traffic. Within a few months, it stopped running altogether. She sold it for $2,000.00. (R. 102,3,14). When Kolupar's attorney sent a letter to Wilde outlining the dual transaction and asking it to resolve the matter for $13,000.00 (R. 104, Exh. "A")(App. 21),the dealership's attorney denied responsibility and refused to negotiate. (R. 104, Exh. "B")(R. 128,99)(App. 22). However, in her July 6, 1995 letter which rebuffed Kolupar's efforts to settle before suit, Wilde's attorney acknowledged that Wilde possessed files arising from its "purchase of a 1993 Pontiac Sunbird on April 4, 1994." (R. 104, Exh. "B")(App. 22).

In short, Wilde's sales manager, Randall Thompson, fraudulently sold a car worth $2,000.00 for $8,600.00. Kolupar's attorney obtained a settlement for $6,600.00, the exact amount of the difference. Yet, the appellate court majority decision states:

> "The trial court properly considered results obtained" (2003 WI App. at¶17),

in reducing attorney's fees from $41,000 to $4,000.

Kolupar's attorneys convinced her bank to accept

$6,600.00 to satisfy a $9,100.00 judgment, which had ballooned into between $17,000.00 and $20,000.00 with interest. (R. 128, 91-92).

In her complaint, Ms. Kolupar alleged:

1. Common law fraud;
2. Violation of TRANS. 139.04, Wis. Admin. Code (inspection/disclosure of defects in vehicles sold by dealerships);
3. Violation of §218.01(9)(b)(1994)(motor vehicle licensee fraud), now renumbered as §218.0163(2), Stats.;
4. Breach of warranty; and
5. Odometer fraud.

B. TRIAL COURT PROCEEDINGS

Wilde began what Judge Ralph Adam Fine's dissenting opinion called "sleazy" and "Rambo" litigation tactics, adding expense and delay to the process (discussed later in this section).

The Court of Appeals' decision affirmed the circuit court decision-making process, which penalized Kolupar and her attorneys for the amount of work they had to do before Wilde took any responsibility for its actions. The circuit court emphasized the small amount of Kolupar's damages, stating "way too much work was done"(R. 129,73)(R. 128,10). It criticized

Kolupar because "discovery was over - - well over-done." (R. 129, 72). However, he did not find Kolupar filed any motion without good cause. By contrast, Wilde bought motions for change of venue, for summary judgment, and for protective order, which were all denied. (R. 128, 41)(R. 14)(R.74).

There is no finding that even one of the twelve depositions (nine taken by Kolupar, three by Wilde) was unnecessary, or not needed to defend on summary judgment, to compel settlement, and to prepare for trial. Yet, Kolupar's attorneys were not paid for any depositions (or for any work)after December of 2000 [2]. Kolupar filed basic document requests, seeking records for both cars involved in the transaction. She requested Thompson's employment records because of Wilde's spurious denial that Thompson was a manager. There is no finding that Kolupar took an unreasonable position regarding settlement. On the contrary, the trial judge acknowledged on the record that Wilde spurned Kolupar's numerous settlement attempts. (R. 129, 23,38). Yet Kolupar's attorneys were not paid to attend the two court-ordered mediations.

The decision-making process approved by the Court of

---

[2] Of the $15,000.00 awarded, $10,673.62 went for costs, which were undisputed. The remaining $4,000.00 paid legal fees for work performed in the case up to December, 2000. All subsequent legal work remains unpaid from the award.

Appeals in a published decision has little resemblance to the methodology adopted by this Court as set out in *Village of Shorewood v. Steinberg*, 174 Wis. 2d 191, 496 N.W.2d 57 (1993) adopting SCR 20:1.5.

On the morning of trial, the circuit court announced that Attorney Frank Crivello (excused the year before after serving four months as discovery referee) would serve as finder of fact. No notice of this procedure was given before trial. (R. 127,14). The appellate court found Crivello's pivotal trial role appropriate under §805.17(2), Stats. Yet Crivello conducted no fact-finding hearings and took no testimony. Crivello lacked familiarity and foundation with the overall action, stating again and again that he did not know about Wilde's denied venue motion, did not know about Wilde's denied summary judgment motion, and that he only served to monitor discovery for a limited period.(R.128,43,44,46). Crivello's "recommendation," accepted carte blanche by the circuit court, had no underlying calculations. The only visible source for the number of $15,000.00 (in lumped-together fees and costs) was that this number had been offered by Wilde. (R. 128,8)(R. 129, 73).

After Crivello's "recommendation" the court stated that the statutory intent of §218.01(9)(b)(1994) was for him to consider Wilde's attorneys fees expended in defending

itself.(R. 129,73).

The trial court accepted the Mr. Crivello's recommendation to award Kolupar's out-of-pocket expenses (undisputed at $10,673.62)and paying about $4,000.00 towards Kolupar's $41,000.00 in attorneys fees to the time of trial. In so doing, the circuit court referenced none of the factors to be considered by it under SCR 20:1.5 and *Village of Shorewood v. Steinberg*. *See* transcript of decision-making process (App.9)(R.129, 71-74).

The evidence in the record addressing the SCR 20:1.5 factors does not support a decision paying $4,000.00 out of $41,000.00 in fees, which the trial court stated he believed were actually devoted to the case. (R. 128,94-95).

The trial court relied upon the Court of Appeals decision in *Aspen Services, Inc. v. IT Corporation*, 220 Wis. 2d 491, 583 N.W.2d 849 (Ct. App. 1998). In *Aspen* the Court of Appeals affirmed an award of sixty percent of the fees requested, because it found that the plaintiff's attorney in *Aspen* was intransigent about settlement. Here, the Court found *Wilde* was intransigent. (R. 129, 23). In *Aspen*, the Court of Appeals approved a reduction of fees because *Aspen's* attorney acted in an uncivil manner. Here, the circuit judge acknowledged Kolupar's attorney did not act uncivilly. (R. 129,52).

Aspen involved a contractual fee-shifting provision in an agreement between commercial parties of equal bargaining position. By contrast, these parties include a teenager and a large corporation owning multiple auto dealerships in the State's largest city.

The circuit court said that the case was "over-tried," "over-pled" and created a "daunting discovery mountain." However, it did not find any depositions were unnecessary, that any causes of action were without merit, or that there were any tasks plaintiff's attorney could have avoided without changing the result. The record demonstrates no process of discretionarily reducing fees to reflect any wasted attorney effort (if any were found).

The Court of Appeals in a reported decision affirmed the trial court's decision-making process. The majority was untroubled that the standards imposed by the Supreme Court in *Village of Shorewood v. Steinberg* (the SCR 20:1.5 factors) were not discussed or even acknowledged, let alone considered and applied in making this award of fees and costs. Because it is a reported decision, it is now a statement of Wisconsin policy.

The lower court ignored substantial credible evidence explaining why Kolupar's bill included $41,000.00 fees and $10,673.62 in expenses by May, 2002. Those reasons included

the following:

- In June, 1995 Kolupar's attorneys wrote to Wilde outlining the transaction and demanded $13,000.00 for Kolupar's expenses and loan (R. 104, Exh. "A")(App. 21). Wilde's response (R. 104, Exh. "B")(App. denied liability, claimed that Thompson had no authority, and offered nothing.
- Kolupar's Complaint (R. 1) identified Thompson as a sales manager. Wilde's answer (R.7) denied this. Wilde's denial dovetailed with its attorney's assertion (R. 104, Exh. "B")(App. 22)that Thompson was outside the scope and had no authority. Since Thompson's managerial status was a critical fact, Kolupar sent document requests in July, 2000, seeking his employment file. When Wilde did not respond and ignored requests that it comply, Kolupar filed a motion to compel heard before Judge Malmstadt September 25, 2000. When produced, records showed Thompson was "Pontiac New Car Sales Manager," paid salary plus a percentage of gross sales(R. 102,9)(App.13).
- In July, 2000, Kolupar requested copies of Wilde's records on the 1993 Pontiac Sunbird and the 1986 Mercedes. No response followed and Wilde did not

seek an extension. Although Wilde's attorney acknowledged Wilde had records from Wilde's re-purchase and sale of Kolupar's Pontiac Sunbird Exh."B")(App. 21),for reasons described as Wilde's inability to find the records (R. 125, 6) or an unwillingness to share records for fear that Kolupar would use them for deposition preparation (R. 24, Exh. "C"), Wilde produced no records and requested no extension. At the discovery motion hearing on September 25, 2000 Judge Malmstadt ordered the Sunbird records produced within thirty days.(R. 24; R. 27). Yet, Wilde failed to produce Sunbird re-purchase records (R.27)(R. 30). Wilde maintained at a second hearing before Judge Malmstadt on November 27, 2000 that it had no such records and that it had turned over everything in its possession (R. 125, 2-3).[3] But then, five months after requested and weeks after the October 25, 2000 deadline in the order,(R. 27)Wilde on December 7, 2000 furnished the Pontiac re-purchase documents. During the trial, Wilde's attorney

---

[3] When plaintiff's attorney reminded Wilde's attorney in November, 2000 that Wilde had not yet complied with Judge Malmstadt's order by providing the Pontiac re-sale documents, Wilde's attorney responded, stating: "No sale, no documents." (R. 52, Exh. "A")(R. 125,4).

acknowledged the Sunbird records were produced, not before October 25, 2000 as ordered, but instead in December 2000, after a second hearing (R. 128, 26). However, in its brief to the appellate court, Wilde inexplicably denied it withheld the records until weeks after the court's deadline, and asserted it complied with the October 13, 2000 Order (*see* Wilde's appellate brief at pp. 6-7, 7-8).

- At the November 27, 2000 hearing, Wilde's attorney represented that documents from its Sunbird re-purchase did not exist:

> "First of all Judge, this is ridiculous that we are here. I have produced every document . . . every file that we have I have produced, . . . we can't give him what we don't have, Judge. . ."

(R. 125, p. 6). During this hearing, frustrated by having to hear the same issues in two successive hearing, Judge Malmstadt appointed a discovery referee. (R. 125)(R. 50).

- Characterized as a "daunting discovery mountain" (R. 129, 72), documents sought included only Wilde's files on two used cars and (because of Wilde's denial Thompson was a manager) Thompson's employment record.
- During the November 27, 2000 hearing, Judge

Malmstadt observed that a GMAC financing application (R. 104, Exh. "C")(App. 13) and an "F & I Deal Worksheet" (R. 104, Exh. "D")(App. 14) prepared by Thompson and provided to Kolupar, corroborated Kolupar's testimony that she was offered a trade-in by Wilde. Judge Malmstadt urged Wilde to consider settlement:

> "The Court: Well, I'll tell you what, perhaps maybe somebody at Wilde Pontiac better take a look at this - - this GMAC financial service document - - customer - - is that Tammy's printing?"

(R. 125, 14)(App. 8, 14). The court returned to the issue later in the same hearing:

> "The Court: It certainly - - I think it is quite unbelievable that this - - GMAC document indicates she traded-in the Sunbird on a Mercedes."

- Despite Judge Malmstadt's strong suggestion that Wilde "take a look" at the GMAC financing application and F & I Deal Worksheet prepared by Thompson (R. 104, Exh. "C" and "D")(App. 14 and 15) which contradicted Thompson's testimony, Wilde made no effort at resolution. Wilde's response was to ratchet up the "Rambo" tactics discussed by Appellate Judge Ralph Adam Fine in his dissent,

including the following:

1. A threat of sanctions under *Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 597 N.W.2d 744 (1999) and §814.025 because Wilde viewed Kolupar's claim as frivolous; and

2. A summary judgment motion (two months late under the scheduling order) which claimed that the statute of limitations for fraud claims had run (it had not) and claimed that Thompson had no real or apparent authority to bind Wilde. The motion was denied. The trial court found factual issues as to whether Thompson utilized dealership forms, computers, and fax machine, and using the dealership's bank as a financing source, to give the appearance of a dealership sale. Depositions of Wilde's Mr. Donahue, Mr. Zanella, and Mr. Vanderveldt, had acknowledged Thompson had authority to deal with the public, and had authority to bind the company as a "closer". (R. 102, 5,6 and 8)(App. 13).

- Wilde's summary judgment motion required a defense, including a brief, legal research, citations to deposition transcripts, and appearing for argument on June 13, 2001. Wilde's "no authority" defense required Wisconsin case authorities involving apparent authority, including *Pamperin v. Trinity Hospital*, 144 Wis. 2d 188, 423 N.W.2d 848 (1988). Kolupar's attorneys were not paid to defend this motion because the fees awarded cover work only through December, 2000.
- The trial court's scheduling order required mediation with parties to appear having authority to negotiate in good faith. But, Wilde's attorney and representative had no authority to negotiate, forcing mediation fail as Wilde made no offer(R. 129, 37-38). Kolupar's attorneys were not paid to prepare for or attend either mediation session.
- Following the first mediation, Wilde received and ignored Kolupar's settlement offer. (R. 125,5,9).
- Wilde's Patrick Donahue claimed Thompson was a rogue employee outside the scope of employment and acting in violation of a "bright-line" Wilde policy prohibiting sales of employee-owned cars at Wilde's dealerships(R. 130, 8). When Kolupar conducted

depositions of Mr. Zanella and Mr. Braun, Kolupar found that Wilde had no policy prohibiting employees from selling their own vehicles at the a dealership(R. 102,10)(App. 13). Mr. Braun, used car manager, said sales of personal vehicles at Wilde were common, and he had done this himself more than once(R. 130,9).

- Considerable discovery, including depositions of Mr. Zanella and Mr. Braun, was required to reveal that Wilde had no policy discouraging "curbing" (personal sales)of cars. Thompson's superiors curbed cars themselves at the dealership.
- Wilde more aggressively pursued discovery into Kolupar's former job as a club dancer, and her breast implants (R. 128, 97) rather than any legitimate defense. The circuit court rightfully characterized this conduct as a cheap shot (R. 128, 97-98(R.129,54)).

Kolupar was criticized for over-trying a case where she promptly accepted Wilde's first offer. She was also critized for conducting too much discovery.(R. 129, 72). Other than documents regarding the two vehicles involved in the sale, and those showing Thompson's managerial status at Wilde, discovery conducted by Kolupar involved depositions. Neither Crivello

nor Judge Cooper reviewed deposition transcripts (R. 129, 48) (R. 130, 10-11)(R. 110). The appellate court too, declined to include them in the appellate record. However, Kolupar utilized deposition testimony to fend off Wilde's summary judgment motion (R. 62)(R. 126, 12,15, 20-21). The court did not find: (1) that plaintiff's hourly billing rate of $145.00 was unreasonable for an attorney with 18 years experience; and (2) did not find any specific work performed was unnecessary, or the time billed for any item was excessive.

Mr. Crivello said that he had to "sanction the plaintiff's counsel several times." The record does not support this conclusion. Crivello stated that he "ordered Mr. Erspamer to prepare an order at the end of the hearing and he never did, so that I was faced with conducting another hearing and literally manufacturing an order on the spot." (R.128,12). However, on cross-examination, Crivello acknowledged that both attorneys were required to draft orders based on their own motions and neither attorney was sanctioned for the delay because there was a delay in obtaining a transcript from the reporter(R.128,15-16).

Crivello further said that he "...sanctioned Mr. Erspamer myself by barring the presentation of testimony, or documents, or witnesses." (R.128, 13). He did bar one witness, Frank Holland, (the Florida man who purchased Kolupar's Mercedes in

1994) from testifying. However, Holland could not be found using four different detective agencies. (R. 128, 55). Holland was barred because he could not be found, not because Kolupar's attorney acted in bad faith. Crivello acknowledged no lack of effort, and no bad faith in failing to find Holland. (R. 128, 55). He allowed a different witness to address the Mercedes' appalling condition. (R.128, 55) (R. 130,9).

Plaintiff named banker, Keith Baisden, to discuss financing practices [Kolupar believed Wilde sent her to Waukesha State Bank (instead of her parents' bank) in an effort to avoid any oversight or veto power by Kolupar's parents, who had co-signed for the Sunbird loan in 1993]. However, Baisden belatedly revealed he had learned his employer barred employees from testifying as experts. (R. 128, 132).

Wilde claimed in the circuit court it could not settle because it could not evaluate Kolupar's claim. Yet, Kolupar itemized her damages again and again. She demanded $13,000.00 in her original settlement offer to Wilde. (R. 104, Exh. "A") (App. 20). She itemized her special damages on the scheduling conference data sheet to the August 8, 2002 scheduling conference as: (1) $8,600.00 loan; (2) $2,000.00 cash; (3) repair expenses; (4) interest and finance charges; and reasonable and actual attorney's fees. (R. 18). Repair

receipts were provided on December 12, 2000 and were summarized in interrogatory answers on February 7, 2001, and were itemized in subsequent amendments to the itemization of special damages(R.104, Exh."H"). Kolupar again itemized damages in mediation submissions. Kolupar bought this car for $8,600.00. She sold it for $2,000.00. She settled for $6,600.00. Damages were not difficult to calculate. Her lender agreed to accept $6,600.00 to satisfy a judgment of $9,100.00 with accruing interest at 12% since 1995 (R.128, 91,123). Wilde submitted its last discovery and conducted its last deposition in December, 2000. Its first offer came in December, 2001 (R. 129,38(R.86).

The record contains alternative explanations for Wilde's refusal to make a settlement offer for two years, Mr. Donahue testified that he chose not to settle because he felt Wilde was not responsible since it did not own the Mercedes at the time of sale(R. 129, 30, 33). Also, Wilde attempted to evade liability for Kolupar's attorneys' fees and costs based on its interpretation of §218.01(9)(b) put forward in its circuit court brief (R. 96).

Kolupar's acceptance of Wilde's first settlement offer before trial left only the question of Kolupar's attorneys' fees and expenses.

The circuit court ended its analysis by stating that it

offset Wilde's obligation to pay Kolupar's fees, by Wilde's obligation to pay its own defense costs (R. 129, 73) (App. 9). The circuit judge observed that he believed his consideration of Wilde's defense costs was consistent with legislative intent (R. 127, 73). He offered no other support for this action.

STANDARD OF REVIEW

A decision to award attorney fees under a fee-shifting statute is discretionary. *See Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 546-49, 597 N.W.2d 744 (1999). A reviewing appellate court will decline to sustain a discretionary act where there is an erroneous exercise of discretion where it finds the circuit court applied an incorrect standard of law, or failed to follow a rational process, reaching a conclusion that a reasonable judge could reach. *See Hartung v. Hartung*, 102 Wis. 2d, 58, 66, 306 N.W.2d 16 (1981). Whether the circuit court utilized the proper legal standard is a question of law reviewed de novo. *See Three & One Co. v. Geilfuss*, 178 Wis. 2d 400, 410, 504 N.W.2d 393 (Ct. App. 1993).

ARGUMENT

I. THIS COURT'S POLICY, DECLARED IN *HUGHES V. CHRYSLER* (THAT SINCE AUTO SELLERS HAVE THE WEALTH, WILL AND EXPERTISE TO EXHAUST INDIVIDUAL LITIGANTS, A SWEETENER OF REASONABLE ATTORNEYS FEES PLUS DAMAGES IS NEEDED OR FEW CONSUMERS WOULD BRING SUCH ACTIONS), WAS FRUSTRATED, AND OVERLAID WITH DOUBT AND CONFUSION, BY THE PUBLISHED APPELLATE DECISION NOW ON REVIEW.

A. An Attorneys Fee Award Paying Only Ten Percent Of Plaintiff's Fees Based Primarily Upon The Modest Recovery Of Damages, Constitutes An Erroneous Exercise Of Discretion As It Mis-Applies Existing Law.

This is a motor vehicle fraud claim against a licensed dealer. Section 218.01(9)(b)(1994) states as follows:

> "Any retail buyer suffering pecuniary loss because of a violation by a licensee of sub. (3)(a)4., 5., 6., 8., 9., 10., 11., 18., or 31., may recover damages for the loss in any court of competent jurisdiction together with costs, including reasonable attorney fee."

See §218.01(9)(b)(1984).

The listed sub-sections create civil liability for dealer misconduct including a violation of administrative rules; fraud as to a retail buyer; willful failure to perform a written agreement; a fraudulent sale, transaction or repossession; any fraudulent mis-representation; and unconscionable practices.

The circuit court expressed its concern about proportionality, and a perceived imbalance between " ... a $6,000.00 case and we have very high attorneys fees ..."(R. 128,10)before uncritically accepting Crivello's recommendation that he "equitably" adopt Wilde's settlement offer of $15,000.00 as an award of unspecified costs and fees (R. 129, 73).

This Court stated its standard for determining attorneys

fees in *Village of Shorewood v. Steinberg*, 174 Wis. 2d 191, 496 N.W.2d 57 (1993), adopting the eight factors set forth in SCR 20:1.5 as those to be applied:

> "The Supreme Court has determined that the factors set forth in SCR 20:1.5(a) should be used when determining the reasonableness of a fee."

Hughes v. Chrysler Motors Corp., 188 Wis. 2d 1, 523 N.W.2d 197 (Ct. App. 1994), affirmed, 197 Wis. 2d 973, 542 N.W.2d 148 (1996).

The factors are these:

> Fees. (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the

professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

See SCR 20:1.5

The process is discretionary, meaning that those standards should be applied to the facts, on the record, applying a reasoned and demonstrated decision-making process:

> "A discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination."

Hartung v. Hartung, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) [emphasis added].

Many decisions have found where a series of factors are to govern a discretionary determination, that it is an erroneous exercise of discretion to fail to craft a decision by applying the facts to the correct legal standard.

Here, neither Mr. Crivello nor the circuit court ever articulated, discussed or applied with SCR 20:1.5 standards.

The Court of Appeals perpetuated Crivello's and the trial court's erroneous exercise of discretion through a misapplication of the law. It is an incorrect view of the law the plaintiff's fee claim must be "reasonable" in light of the

recovery. It has to be reasonable in light of the time and skill required - - which is entirely dependent on whether defendants engage in abusive tactics. When a defendant fights a $6,600.00 case with arguably $60,000.00 in legal defense (Wilde's fees were acknowledged to be $30,000 halfway through the circuit court proceedings)(R. 128,9), a $40,000.00 plaintiff's fee is reasonable. Please note the trial court granted Wilde's motion to quash a subpoena seeking Wilde's defense billings (R. 129,14-45).

Although plaintiff's pre-trial submissions, and the testimony elicited by plaintiff at trial, address the standards under *Village of Shorewood v. Steinberg* and SCR 20:1.5, the trial court rejected these standards. For example, the decisive factor for the circuit judge was not one listed in *Shorewood* or in SCR 20:1.5. For him the decisive factor in awarding fees and costs to Kolupar was the amount of money Wilde had spent to defend the claim.

Moreover, the trial judge refused to consider the first factor listed in SCR 20:1.5 1(a), the time and labor involved by the attorneys for the prevailing party.

Indeed, plaintiff attempted to elicit from Mr. Crivello, a witness called by Wilde, testimony establishing that, where there is a fee-shifting statute, the longer the litigation continues, the more depositions and court hearings will take

place, and the more attorneys time and expenses will be billed (R. 128, 47 - 49). The trial court judge, however, rejected this testimony, stating it was "not particularly material." (R. 128, 49). In its decision, the trial court expressly rejected considering the time and labor devoted to the case by Kolupar's attorneys before Wilde offered a settlement. The circuit judge expressly declined to place any significance, or "draw anything negative to one side..." as to the time and labor required before Wilde offered to pay Kolupar's damages shortly before trial. (R. 129, 73).

In adopting and relying on a factor nowhere sanctioned by any Wisconsin statute or appellate decision (the attorneys fees of the fraudulent party)and in expressly rejecting the factors mandated by *Village of Shorewood v. Steinberg* and SCR 20:1.5, the circuit judge engaged in an erroneous exercise of discretion. That error was perpetuated by the reported appellate court decision.

Mr. Crivello, the former referee, recommended[4] that the

---

[4] The referee, commissioned for a period in 2001 to resolve discovery disputes acknowledged his "recommendation" was based on very limited knowledge: (A)He did not know Wilde increased the costs of the action by producing substantial documents requested in July, 2000 in December, 2000 after two hearings to compel, after defense counsel in November, 2000 stated as follows:

> "First of all, Judge, this is ridiculous that we are here. I have produced every document . . . Judge, if we - - every

court adopt Wilde's settlement offer of $15,000.00 (R. 128, 88) in fees and expenses as "equitable" based on his mistaken belief plaintiff violated a court order requiring her to disclose her fee invoice in February, 2002. *Ibid.* The court had not so ordered (R. 127, 13-14), and the fee invoice was provided to defendants before the November, 2001 mediation

---

> file we have I have produced, . . . but we can't give him what we don't have, Judge."

(R. 125, 6)(R. 128, 26)(App. 11, 8)[emphasis added].

(B) He did not know Wilde filed a summary judgment motion claiming the six-year statute of limitations on a fraud claim had run [where the action was filed within six years], and claimed that "new car manager" Thompson lacked authority to deal for Wilde](R. 128, 43); (C) He did not know Wilde filed a motion for change of venue from Milwaukee County to Waukesha County, denied after two hearings and two briefs from each party. (R. 128, 44); (D) He did not know Kolupar made a pre-suit demand of $13,000.00 which generated no offer from Wilde, and that all of plaintiff's settlement offers until December, 2001 were ignored. (R. 128, 46); (E)He acknowledged that his involvement in the case was limited and that he was "only appointed to handle discovery;" (R. 128, 46)(R. 110, ¶ 19); (F)He acknowledged that when parties agree to submit a case to mediation, parties come prepared to make an offer. (R. 128, 47). In this case, Judge Malmstadt ordered mediation before Judge Zick which took place on July 27, 2001. Mr. Crivello did not know Wilde made no offer. Judge Cooper ordered a second mediation concluded on November 27, 2001. Kolupar served a formal offer of settlement after each mediation. Wilde first made an offer of any kind on the case following the second mediation session in November, 2001. (R. 129, 12)(R. 129, 38); (G) Crivello testified (R. 128, 84) as to his hearsay "knowledge" that plaintiff hadn't complied with a discovery order (R. 27) but admitted that he had no knowledge when shown a letter demonstrating plaintiff's compliance. (R. 128, 85).

date (R. 128, 6). The court did not acknowledge, discuss or engage in any analysis of the factors from *Village of Shorewood v. Steinberg, supra*. The trial court relied on a far different standard, accepting uncritically the "recommendation" of the former referee, based on these factors:

1. The consumer's damages, $6,600.00, was "barely more than a small claims case." (R. 128, 87);

2. Mr. Crivello's observation that:

> "And I don't think the case is worth much more than $15,000.00, frankly." (R. 128, 88)(App.6);

3. Conclusions that the case was "over-tried" and "over-pled" and "discovery was well over-done," without citing specifics or examples (R. 129, 72)(R. 128,87)(App. 6); and

4. An offset of Wilde's obligation to pay Kolupar's fees and costs by considering Wilde's own defense costs - - a step unsupported in Wisconsin jurisprudence. (R. 129, 73).

Fee-shifting statutes are an exception to the "American Rule" where each litigant is responsible for his or her own attorney's fees. Our legislature has specified remedial statutes where prevailing parties are awarded fees and expenses. Fee-shifting statutes open the courthouse door where it would otherwise be locked for consumers, residential tenants, victims of employment misconduct or discrimination. These laws balance the parties' access to competent legal

representation, leveling the playing field.

Our appellate decisions supply the rationale:

> "These corporations not only have the wealth and will to exhaust an individual litigant, but also control vast amounts of technical expertise on the very mechanical aspects the consumer is challenging. Without the sweetener of . . . damages in a sufficient amount and reasonable attorneys fees, few consumers would bring such actions."

Hughes v. Chrysler Motors Corp., 197 Wis. 2d 973, 985, 542 N.W.2d 148, 152 (1996) [emphasis added].

For example, in residential tenancies, §100.20(5), Stats., and ATCP Ch. 134 mandate tenants who recover a wrongfully-withheld security deposit, recover reasonable attorneys fees. Few tenants can pay fees and costs as they go. Thus, the fee-shifting provision provides access to the courthouse. Without confidence that fee-shifting rules will be uniformly enforced, private attorneys will avoid such claims. If confidence in enforcement of these rules wanes, as it must with decisions like the one on review, there will be little remedy for a landlord's security deposit violation, or a car dealer's fraud in a used car sale, since it will cost more to pay a retainer than consumers can recover. *Shands v. Castrovinci* articulated the policy rationale for awarding fees as follows:

> "(1) the recovery of double damages and

> attorneys fees provides tenants with an incentive to bring legal actions to enforce rights under the administrative regulations; (2) actions brought by tenants serve not only to enforce their individual rights but also act as a "private attorney general" to enforce the aggregate rights of the public; (3) tenants' suits deter impermissible conduct and thereby strengthen the bargaining power of tenants in dealing with landlords; and (4) because the sheer number of violations prevent the Department of Justice from proceeding against all violators, private actions provide an important backup to the state's enforcement powers under sec. 100.20. *Shands*, 115 Wis. 2d at 358-59, 340 N.W.2d at 509."

The legislative purpose of leveling the playing field is served when attorneys are fairly compensated. If claimant's lawyers are not fairly paid, how many will file these claims? Even consumers with legitimate claims would find that unenforced legislative remedies become meaningless words. A meritorious claimant unable to hire an attorney is one without a remedy.

Fee awards must reasonably compensate attorneys for prevailing consumers. Fee awards encourage attorneys to assist in the private prosecution of consumer law violations. *Reusch v. Roob*, 2000 WI App. 76, ¶36, 234 Wis. 2d 270, 292, 610 N.W.2d 168 (2000). Lawyers will not take cases if they know they will not be paid.

If individuals cannot pursue wrongdoers, then state

agencies charged with public enforcement of these laws [e.g. Department of Transportation for Ch. 218; Department of Justice for Wisconsin Consumer Act, Chs. 421-427] will need to hire scores of lawyers at public expense to ensure that the laws are enforced in Wisconsin. Payment for public enforcement will be shifted from the wrongdoer to the taxpayer. Forcing wrongdoers, not the public, to finance enforcement is the intent of the legislature.

This Court has uniformly held that a court deciding claims under fee-shifting statutes shall ensure that claimant's attorneys are fairly paid. *First Wisconsin Nat'l Bank v. Nicolaou*, 113 Wis. 2d 524, 335 N.W.2d 390 (1983) held:

> The Nicolaou's attorneys attached an exhibit to the petition for attorney fees which documented the time spent on each aspect of the case and the rate charged. Up to that point, the grand total claimed for services rendered was $20,462.66. At oral argument the Bank conceded the accuracy of the Nicolaou's attorney fee records, stating that it did not challenge either the number of hours or the rate. Nevertheless, the Bank argues that attorney fees should be limited to the amount of the recovery. This contention is without merit. The primary consideration in establishing the amount of attorney fees is that the award must be sufficient to compensate the attorneys.
>
> To a large extent the WCA depends upon private lawsuits for its enforcement. Ordinarily, however, the amount of damage flowing from WCA violation is insufficient to make it economical for a consumer to initiate legal action. Indeed, the cost

> of legal representation will often exceed the recovery in a WCA case. In short, the policies of the WCA will not be effectively carried out through private enforcement unless adequate attorney fees are awarded to prevailing consumers."

Nicolaou, 113 Wis. 2d at 538-539[emphasis added].

It is long-established that the amount of money awarded to a prevailing claimant is not decisive. One factor under *Shorewood* and SCR 20:1.5 is the "amount involved and the results obtained." However, the result obtained is not necessarily limited to the money damages. Here, Kolupar settled the claim for $6,600.00, the precise amount she lost after she paid $8,600.00 for a car worth $2,000.00. She used that amount to satisfy a judgment of $9,100.00 from the car loan, plus 12% interest accruing since 1995 (R. 128, 91-92), from $17,000.00 to $20,000.00.

The appellate court affirmed the trial court decision adopting a standard of proportionality, where attorney's fees will not be awarded where fees significantly exceed the amount recovered. That standard creates new and bad policy for Wisconsin. *Nicolaou* shows us if fees must be proportional to the amount recovered, sophisticated defendants will squelch future claims by holding out until claimant's attorney's fees approach the amount (or some set multiplier of the amount) in dispute. This deprives claimants of a remedy where amounts in dispute are small. As *Nicolaou* teaches, once it is seen that

attorney's fees are gauged on the amount in dispute, private attorneys will not handle consumer act cases, landlord-tenant cases, or auto fraud cases.

Answering the question of whether the amount recovered should be a key factor in setting fee awards, our decisions have said:

> The fact that the plaintiff's attorney's fees may equal or exceed the recovery awarded is not a manifest injustice to the defendant warranting a reduction in the fees awarded. See, e.g. *Nicolaou, supra* (plaintiffs recovered $5,193.08 damages; supreme court awarded $20,462.22 attorney fees.
>
> The primary consideration in establishing the amount of attorney fees is that the award must be sufficient to compensate the attorneys." *First Wisconsin Nat'l Bank v. Nicolaou*, 113 Wis. 2d at 538, 335 N.W.2d at 397.

Clark v. Aetna Finance Corp., 115 Wis. 2d 581, 590, 340 N.W.2d 747 (Ct. App. 1983) [emphasis added].

This rule (that legitimate fees may well exceed the amount in dispute) is well established. For example, in *Herzberg v. Ford Motor Co.*, 2001 WI App 65, 242 Wis. 2d 316, 626 N.W.2d 67 (Ct. App. 2001) the court awarded $54,000.00 in fees in a "lemon law" claim concerning a $17,000.00 Mercury Mystique. *See Herzberg*, 2002 WI App. 65, ¶5, f.n.6.

This trial court abdicated its responsibility to analyze fees and expenses, adopting uncritically the former referee's

flawed "recommendation," based on mistaken facts. He believed plaintiff violated an order requiring her to disclose her invoice for fees(R. 128, 88). There was no such order (R. 127,13-14). In fact, plaintiff sent the invoice to defendants months earlier. (R. 128, 6). Crivello recommended Wilde's $15,000.00 offer be adopted by the court since the $6,600.00 settlement was "barely a small claims case." (R. 128, 87)(App.6). From *Nicolaou supra*, forward, this rationale mis-states the law. The primary consideration is that the award must sufficiently compensate the attorneys , 113 Wis. 2d at 538.

To mis-apply the law in setting fees is an erroneous exercise of discretion. It also disrupts the balance drawn between consumers and fraudulent or scofflaw businesses by our legislature and our courts.

B. To Add Clarity To The Process Of Fee Awards In Statutory Fee-shifting Cases, And Avoid Awards Based Primarily On The Cash Amount Received, Wisconsin Should Consider The "Lodestar" Analysis Enshrined In Federal Jurisprudence.

The "guiding light" of federal attorney fee-shifting jurisprudence for two decades or more is the lodestar figure - hours reasonably expended, multiplied by a reasonable hourly rate. *See Gisbrecht v. Barnhart* , 535 U.S. 789, 801 (2002). This method of fee calculation achieved dominance after *Hensley v. Eckerhart*, 461 U.S. 424 (1983), which concerned a

claim under 42 U.S.C. § 1988. The *Hensley* court instructed lower courts on the proper method for calculating a "reasonable fee:"

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed.

Id. 461 U.S. at 433. Once the party seeking fees has shown that the claimed rate and number of hours are reasonable, the resulting product is *presumed* to be the reasonable fee. *Blum v. Stenson*, 465 U.S. 886, 897 (1984). After making this initial calculation, the lower court may adjust the fee upward or downward based on additional factors (including the factors adopted by this Court from SCR 20:1.5).

Under *Hensley*, "many of those factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Id.* n.9.

Since *Hensley*, federal courts apply the lodestar method in a variety of settings with fee-shifting statutes like the Clean Water Act. *Gisbrecht*, 535 U.S. at 801. Indeed, the "lodestar method today holds sway in federal-court adjudication of disputes over the amount of fees properly

shifted to the loser." *Id.* at 802.

This case provides a vehicle for this Court to consider adopting the lodestar analysis for Wisconsin. It also is appropriate for implementing another rule adopted in the federal courts, which allows consideration of the current market rate to compensate attorneys for prevailing parties, rather than the contractual rate reached between the parties years before. Kolupar's attorney now bills at $195.00 per hour. Trial testimony established rates of attorneys handling similar work in 2002 in the range of $200.00 to $230.00 per hour (R. 128, 122).

Plaintiff's attorneys first worked on this case in 1995. The bulk of work came in 2000 and 2001. To-date, they have received nothing towards their fees and nothing towards their $10,673.62 out-of-pocket expenses invested up to the trial (R. 19).

Kolupar and her attorneys ask this Court to consider authorizing an adjustment in a prevailing plaintiff's hourly fee rate to reflect realities of the time value of money and the reality that plaintiff's attorneys must finance the expenses of a consumer claim.

The United States Supreme Court has consistently applied the current hourly rate of the prevailing plaintiff's attorney in such cases under this rationale:

> "First is the matter of delay. When plaintiffs' entitlement to attorney's fees depends on success, their lawyers are not paid until a favorable decision finally eventuates, which may be years later. . . . Meanwhile, their expenses of doing business continue and must be met. In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value. [Citations omitted.]
>
> "The same conclusion is appropriate under sec. 1988. Our cases have repeatedly stressed that attorney's fees awarded under this statute are to be based on market rates for services rendered. [Citations omitted.] Clearly, compensation received several years after the services were rendered - - as it frequently is in complex civil rights cases - - is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billing. We agree, therefore, that an appropriate adjustment for delay in payment - - whether application of current rather than historic hourly rates or otherwise - - is within the contemplation of the statute."

Missouri v. Jenkins, 491 U.S. 274, 283-84, 105 L.Ed.2d 229, 109 S.Ct. 2463 (1989).

Appellant believes that the reasoning from *Jenkins* is applicable here. The current $195.00 hour billing rate should be used in setting the attorney's fee award.[5]

---

[5] According to the 2001 Wisconsin Bar Association Economics of Law Practice Survey, the average overhead for an attorney was $68,664. *Id.* The average billable hours per year worked by an

C. The Court Mis-Applied *Aspen Services, Inc. v. IT Corporation* Where It Relied On Rules Construing A Contractual Fee-Shifting Provision Between Commercial Equals To Reduce Fees In A Consumer Case Governed By A Statutory Mandate.

Our decisions applying fee-shifting statutes anticipate a careful, discretionary examination of an itemized attorney's bill. This cautious approach has prevailed in statutory fee awards until recently. However, a different approach, albeit in a different setting, was approved in *Aspen Services, Inc. v. IT Corporation,* 220 Wis. 2d 491, 583 N.W.2d 849 (Ct. App. 1998). *Aspen* deviates from the prevailing methodical, item-by-item approach.

Aspen construed a contractual rather than statutory fee-shifting provision, allowing a lessor fees in event of a breach by a commercial lessee. It did not dovetail well with the facts of this case.

---

attorney was $1,712.00. *Id.* This means that the average attorney must bill $40.11 merely to cover overhead. The hourly rate earned by the plaintiffs attorneys, based on the fees after costs, were roughly $15.30 per hour. ($15,000 award - $10,673.62 in costs divided by 281.67 hours). Thus, at the trial court's award, assuming that the plaintiff's attorneys expenses and productive hours worked mirror the average, the attorneys for the successful plaintiff actually lost $24.61 for each hour they worked on the case. *See* www.wisbar.org/newsletter/2001/11/econ.html (site last checked November 19, 2003). Under the "equitable" adoption of Wilde's $15,000.00 offer advocated by Crivello, he charged more than the $4,300.00 his recommended award would pay (after expenses) to Kolupar's attorneys. Crivello, who conducted three hearings of approximately two hours each billed $2,850.00 from each party, totalling $5,700.00

Instead of relying on *Aspen*, the lower court would have been better served to follow *Crawford County v. Masel*, 2000 WI App. 172, 238 Wis. 2d 380, 617 N.W.2d 188 (Ct. App. 2000). In *Crawford*, the Wisconsin Court of Appeals adopted as "persuasive" a body of case law developed in the Federal Seventh Circuit Court of Appeals, which mandates that trial judges must not arbitrarily reduce a prevailing plaintiff's fees and litigation expenses submitted under a fee-shifting statute, without substantial evidence to justify that action. In *Crawford*, our Court of Appeals stated as follows:

> Although a trial court has wide discretion in calculating an appropriate fee award, if an hourly rate or number of hours is reduced, a clear explanation must be provided [citations]. The Seventh Circuit has also reiterated the prohibition against a trial court "eyeballing" a fee request and arbitrarily reducing a fee request by the prevailing party without evidence to support the reduction [citations].
>
> Although we are not bound by these Seventh Circuit opinions [citations], they are persuasive.

See Crawford County v. Masel, 2000 WI App. 172, ¶¶ 16-17, 238 Wis. 2d at 390[emphasis added].

Aspen claimed IT owed it $19,000.00. Before suit, defendant tendered the amount in dispute, offering $14,948.75 and forfeiting a $5,000.00 security deposit. *Aspen*, 220 Wis. 2d at 500. The circuit judge observed that plaintiff's

attorney "over-tried" the case (the verdict netted $18,300.00, less than the pre-suit offer).

The court suggested that the entire action was avoidable since defendant had offered to pay before suit. The court found that *Aspen* expanded the controversy, prolonged the dispute and maximized the accrual of fees and costs.

The *Aspen* court reduced plaintiff's fees, noting plaintiff's attorneys exhibited uncivil language and behavior having no place in the civil litigation process. *Aspen*, 220 Wis. 2d at 499-500. The judge declined to engage in an item-by-item evaluation, relying on "the entire record," granting $68,000.00 in fees (about 60%) of almost $113,000.00 claimed. The appellate court approved this procedure, stating:

> The trial court did not make particularized findings of fact identifying each and every act of incivility it believed warranted a reduction of the requested attorney's fees. The trial court relied upon the entire record, including all available transcripts, rather than undertake the time consuming and daunting task of retrying the entire lawsuit. Under the circumstances, it was not a misuse of discretion for the court to characterize counsel's conduct rather than particularize that conduct.

See Aspen, 220 Wis. 2d at 499[emphasis added].

The Court of Appeals upheld this contractual construction, agreeing *Aspen's* attorneys needlessly increased the cost of resolving the dispute.

While appropriate in that context, (since the entire suit was avoidable) and where the amount of fees appeared expanded by *Aspen's* behavior, the procedure used in the Aspen decision can be misunderstood. *Aspen* may appear to give trial judges "permission" to short-circuit the time-consuming process by which prevailing plaintiff's attorneys fees are analyzed. A judge may invoke *Aspen* to reduce fees on the basis of a gut feeling or a "general impression," without engaging in the discretionary analysis determining which items should be awarded and which rejected. Under *Crawford, supra,* "gut feeling" or eyeball reductions are erroneous.

This is of statewide concern because in many cases, our appellate courts have reversed trial court decisions which improperly reduced fees and expense awards. *Aspen* may be misread as approving such reluctance to award fees in full.

The *Aspen* court relied expressly on incivility of plaintiff's counsel, and plaintiff's intransigency regarding settlement in reducing the fee. Here, it was acknowledged that Kolupar's lawyers were not uncivil, (R. 129, 52) and that Wilde, not Kolupar, was intransigent regarding settlement. (R. 129, 23)(R. 129, 9, 38). Moreover, unlike *Aspen,* this case arises from a legislative mandate, not a contractual clause.

The Court of Appeals' decision focuses on giving

deference to the trial court in its exercise of discretion. But under any careful examination, *Aspen* is easily distinguished from this proceeding. *Aspen's* analysis never fit the facts of this case. Here, Wilde's sales manager defrauded a teenager to enrich Wilde and himself. Wilde then played hardball over two years of litigation before taking any responsibility. Kolupar had to file suit, proceed through discovery and prepare for trial (including defending Wilde's motions), unless she wanted to abandon her claim. *Aspen*, by contrast, is a case where the plaintiff should have accepted the pre-suit offer. Wilde made no pre-suit offer for Kolupar to accept.(App. 22).

The only specific factor under SCR 20:1.5 and *Village of Shorewood* discussed or developed involved the complexity of the litigation. Crivello mentions the complexity of the case as a "two person transaction for an automobile." (R. 128,87).

Indeed, Wilde argues the case was such a simple transaction that Kolupar's attorneys have been "sufficiently compensated" (*Nicolaou*, 113 Wis. 2d at 538) by receiving $4,000.00 towards the $41,000.00 in fees the court found were actually expended (R. 128, 94-95).

Was this a simple transaction? Thompson's profitable trade-in deal was clear enough that when Wilde's Patrick Donahue learned of the deal, Thompson was fired immediately

(R. 129, 19-20).

The complexity in the case arose first from Wilde's denial that Thompson was a manager. This required a deposition and review of Thompson's employment file to learn his role. Wilde then stonewalled by claiming that Kolupar and Thompson were boyfriend/girlfriend, suggesting a collusory claim. However, there was no evidence of such a relationship(R. 126,14-15).

Wilde next asserted that Thompson was outside the scope, engaging in a forbidden and unanticipated personal transaction, by selling his Mercedes in the guise of a trade-in(R. 130,8). However,"curbing cars" (a time-honored practice in which auto dealership employees use dealership facilities to sell personally-owned cars)(R. 130,9), was a common Wilde fringe benefit. Mr. Zanella, Thompson's supervisor, acknowledged there was no policy forbidding this practice(R. 102,9-10)(App. 13). Mr. Braun, Wilde's used car manager, said there was no prohibition on "curbing cars" and he did so while there (R. 130,9). He further acknowledged that he had approved the acquisition of Kolupar's Pontiac by Wilde, and that the car was re-sold (R. 102,14).

Wilde asserted Kolupar could not have reasonably relied on assurances the Mercedes was sold by Wilde because there was no dealership paperwork. Wilde ignored the GMAC financing

form and the F & I deal worksheet prepared by Thompson on Wilde forms, both showing fictitious terms of a trade-in deal (see the "trade" value of $8,995.00)(R. 104, Exh. "C" and "D")(App. 14, 15).

Finally, Wilde attempted to assert that the Sunbird re-sale was not profitable to it. However, discovery it clear (with an insurance check) Wilde received more ($11,495.00)to sell it to a customer named Joan Kojis, than it paid Kolupar, and her lender, and for vehicle preparation (R. 102,14).

Wilde's tactics attempted to evade responsibility by introducing elements of complexity, and introducing hurdles to Kolupar's recovery. Only by conducting the depositions of Bradley Braun, Mr. Zanella, James Vanderveldt, and other Wilde employees and Department of Transportation employee, Dexter White, was Kolupar able to compel a settlement.

In short, Wilde increased Kolupar's costs by withholding discovery, raising spurious defenses (like its assertion that Thompson was not a Wilde manager)and baseless factual assertions which, as Appellate Judge Ralph Adam Fine noted in his dissent:

> ". . . threw obstacles in Kolupar's path that would make James Bond and his nails-and oil-disgorging Aston-Martin green with envy."

See Court of Appeals decision, 2003 WI App. at ¶26,(App. 1).

The lower court's rationale for awarding Kolupar an

amount covering her out-of-pocket costs, together with ten percent of her attorneys fees[6] departed from the standards imposed in *Nicolaou* and *Shorewood*:

1. It adopted Crivello's recommendation of $15,000.00, a figure coming not from any analysis, but from Wilde's pre-trial offer (R. 128, 8)(R. 129, 73);
2. The principal reason stated was plaintiff's $6,600.00 damages were modest and "barely over a small claims case." (R. 128, 87)(R. 128, 10).
3. The trial judge offset his award by considering Wilde's costs in defending itself (R. 129, 73), stating this complied with the legislative intent.

---

[6] The $15,000.00 which the trial court awarded, comprising both fees and costs, pays plaintiff's $10,673.62 litigation expenses up to the time of trial. It pays $4,326.38 towards attorneys fees which would compensate plaintiff's attorneys through preparation of pleadings and preparation of the first set of document requests (seeking dealer files on both cars and Thompson's employment file) and through Wilde's venue motion. The award leaves Kolupar's lawyers uncompensated for work on the file after the fall of 2000, including defending Kolupar's claim from Wilde's summary judgment motion, including two pre-trials (with pre-trial submissions) including two mediation attempts and including the depositions taken by Wilde's attorneys and those taken by Kolupar's attorneys. *See* attorneys fee invoice. (R. 118)(App. 18 and 19).

II. THE TRIAL COURT'S ERRONEOUS EXERCISE OF DISCRETION IN FAILING TO CONSIDER AND APPLY THE SCR 20:1.5 STANDARDS AS MANDATED BY *VILLAGE OF SHOREWOOD v. STEINBERG*, WAS THEN PERPETUATED BY THE COURT OF APPEALS IN A REPORTED DECISION.

Judge Cooper, who presided at trial, was not the judge who denied Wilde's venue motion and denied Wilde's summary judgment motion. He had not heard the motions in September and November, 2000 which belatedly forced Wilde to produce its files on these two used cars. He had not ordered the mediation where Wilde refused to make any offer. Judge Cooper, new to the case, delegated this messy issue to Crivello, the former discovery referee. Judge Cooper failed to note the discovery referee served only between May and August the previous year, and lacked overall knowledge for any recommendation. Crivello's charter (R. 50) (App. 5) was limited to discovery disputes and did not include fact-finding under §805.17(2), Stats. Crivello heard no evidence. He reported "general impressions," not factual findings.

Crivello's recommendation is based on errors of law and fact. *See* (R. 128,88)(compare with R.127,14). Focusing on Kolupar's modest damages runs afoul of the *Nicolaou* line of decisions.

The lower court's failure to discuss or apply the standards from *Village of Shorewood v. Steinberg*, *Ibid.* and

SCR 20:1.5 was unfortunately endorsed by the Court of Appeals.

Where there is a failure to apply a correct legal standard, an erroneous exercise of discretion will be found. *In re Marriage of King*, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (Ct. App. 1999).

The lower court ignored substantial credible testimony from Wilde's Executive Vice-President, Patrick Donahue, who even at trial claimed the dealership had no responsibility to Kolupar(R. 129, 28-30). Donahue's denials, even after settling, explain the expensive two year delay in resolving this matter. Without applying the correct standard, the lower court's evaluation of the time and labor expended by Kolupar was flawed. A clear mandate is needed.

III. THE DECISION ON REVIEW FRUSTRATES THE LEGISLATIVE INTENT AND FRUSTRATES DESIRABLE PUBLIC POLICY BY DISCOURAGING, RATHER THAN ENCOURAGING, USE OF MEDIATION AND STATUTORY SETTLEMENT OFFERS.

The legislature in §§802.12(2) and 807.01, Stats. adopted provisions encouraging alternative dispute resolution and pre-trial settlement.

Sections 802.12 and 807.01 are procedures clearly intended to foster settlement, saving the expense and burden of prolonged litigation.

The decision on review has the unfortunate effect of frustrating the legislative intent in enacting §§802.12 and 807.01(1), Stats.

These parties twice were ordered to mediate in July and November, 2001. The first mediation was wasted as Wilde made no offer, violating the scheduling order (R. 19, ¶5)(R. 129, 36-38). The second mediation was followed by Wilde's December, 2001 statutory offer (App. 17)which was accepted(R. 86). However, Kolupar was not compensated for attorneys time in preparing mediation submissions or attending mediations. The $4,000.00 left for attorneys time, after expenses, paid her attorneys fees only until fall 2000. Consequently, plaintiff's attorneys were uncompensated for both mediation efforts in 2001.

Readers of the appellate decision who learn Kolupar was uncompensated for fees for two mediation sessions, will be little encouraged to mediate. Moreover, although the legislative purpose in §807.01 was to facilitate settlement, denying taxable costs to Kolupar on an offer she accepted (which included "taxable costs") will hardly facilitate settlement through statutory offers of settlement or offers of judgment under §807.01.

The Court of Appeals affirmed a denial of taxable costs, citing to the trial court's off-the-cuff parting statement that the $15,000.00 awarded for fees included the $10,673.62 in out-of-pocket expenses (R. 129,73-74)(App. 9). This is another failure to exercise discretion. Attorneys will have no

confidence in using statutory settlement offers if trial courts will not enforce their terms.

IV. THE TRIAL COURT'S MORNING-OF-TRIAL RETROACTIVE ELEVATION OF THE FORMER DISCOVERY REFEREE, WHO HAD SERVED FOR A LIMITED FOUR-MONTH PERIOD THE YEAR BEFORE TRIAL, TO THE ROLE OF SPECIAL MASTER FOR FACT-FINDING, WAS AN ABDICATION OF THE TRIAL COURT'S RESPONSIBILITY, SINCE THE FORMER REFEREE HAD CONDUCTED NO EVIDENTIARY HEARINGS, MADE NO SPECIFIC FINDINGS, AND HAD VERY LIMITED FOUNDATIONAL KNOWLEDGE.

The Court of Appeals approved the circuit court's delegation and abdication of its decision-making, not to a special master appointed to conduct evidentiary hearings and find facts under §805.17(2), but instead to a discovery referee who served the previous year for four months (out of twenty-seven)and then was excused. Crivello's implicit elevation to fact-finder occurred at the start of trial, without prior notice when the proceeding was scheduled(R. 127, 14). He lacked foundational knowledge of the development of the case (R.128, 43-44, 46,85). He admitted he was appointed only as a discovery referee(R. 128, 46).

Crivello appeared, not as a special master reporting on his fact-finding, but instead as a partisan witness.

Neither Crivello nor the circuit judge cited specifics for conclusions that the case was "over-tried," "over-pled", or "discovery was over-done." The court specified no cause of action that lacked merit, instead finding Kolupar "proved

those elements" of her claims(R. 130, 10). Neither Crivello nor the court reviewed deposition transcripts to find unnecessary discovery(R. 110, ¶14,15)(R. 130, 8-10). Although both said the case took too long (R. 129, 73-74)(App. 9), neither suggested how a consumer could reach an earlier resolution, short of dismissal, when facing no offer to settle, and facing Wilde's "Rambo" and "scorched-earth" tactics. (*See* dissent of Judge Fine, ¶¶23,26).

The Court of Appeals relied upon *MacPherson v. Strand*, 262 Wis. 360, 366, 55 N.W.2d 354 (1952) allowing a judge to delegate to a referee for fact-finding. But here, no fact-finding occurred. Instead, the trial court adopted the discovery referee's "general impressions" (R. 128, 13), as well as his mistaken legal conclusions that the fee award was governed more by the amount of plaintiff's damages, rather than by the time and effort needed to reach a recovery.

The trial court improperly delegated its decision to a discovery master whose only authority was to referee discovery disputes between May and August of 2001. It was extraordinary to change the discovery referee's status retroactively, at trial, from an excused discovery referee to a special master for fact-finding.

Under *MacPherson*, a referee appointed before trial conducted a hearing, heard sworn testimony and established

facts in a report filed with the court. 262 Wis. at 364-65. Here, the discovery referee heard no testimony, completing his discovery duties a year before trial. The trial court also unfortunately relied upon matters "intimated" by the former referee in private(R. 129, 72)(App. 9). This procedure is not authorized by §805.17(2) nor by *MacPherson*.

The decision on review upheld an abdication of the trial court's decision-making to a former discovery referee, with little knowledge about why so much time elapsed before resolution, and with admittedly little knowledge about how this merchant drove up a consumer's costs before taking responsibility.

CONCLUSION

Plaintiff-Appellant, Tammy Kolupar, respectfully asks this Court for an order awarding her the fees and expenses presented to the circuit court, and remanding for a determination of fees and costs subsequent to the invoice submitted (R. 118)(App. 19) for later proceedings in the circuit court and on appeal, under §218.01(9)(b)(1994)and consistent with this Court's decisions on the issue.

Respectfully submitted this 20th day of November, 2003.

LISKO & ERSPAMER, S.C.
Attorneys for Plaintiff-Appellant-Petitioner

By: _____
Paul M. Erspamer
State Bar No. 1010824

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this brief is 49 pages.

Paul M. Erspamer

INDEX TO APPENDIX

Gutenkunst, dated December 13, 2001. (R. 86).

18. Plaintiff's itemized invoice of attorneys fees and expenses/disbursements. (R. 118)

19. Affidavit of Laura M. Martinco, dated June 21, 2002. (R. 118)(reconciling fees and costs in invoices).

20. Scheduling Order, dated August 8, 2000.

21. Pre-Suit Demand Letter to Wilde Pontiac of Waukesha, dated June 15, 1995.

22. Letter from Attorney Gutenkunst on behalf of Wilde dated July 6, 1995. (denying liability).

APPENDIX OF PLAINTIFF-APPELLANTS-PETITIONERS

APPENDIX 1

COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-1915 Cir. Ct. No. 00CV2571

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

TAMMY KOLUPAR,

PLAINTIFF-APPELLANT,

V.

WILDE PONTIAC CADILLAC, INC.
AND RANDALL THOMPSON,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 CURLEY, J. Tammy Kolupar appeals from the order and judgment awarding her $15,000 in attorney fees and costs, rather than the $53,000 in fees and costs requested, in her action against Wilde Pontiac, Cadillac, Inc. (Wilde) and its employee Randall Thompson, alleging that Thompson fraudulently

sold Kolupar a substandard vehicle. Kolupar contends that the trial court: (1) erroneously exercised its discretion in failing to admit into evidence an invoice itemizing Kolupar's attorney's fees and litigation expenses; (2) erred in relying upon the recommendation of the discovery referee; (3) failed to apply the correct legal standard in refusing to award $53,000 in fees and costs; and (4) erred in denying taxable costs. We disagree with Kolupar and affirm.

I. BACKGROUND.

¶2 On March 30, 1994, Kolupar traded in her used 1993 Pontiac Sunbird for a 1985 Mercedes Benz 190E at Wilde. Nine months earlier, Kolupar had purchased the Sunbird from Wilde upon her graduation from high school. On March 30, 1994, Kolupar still owed $10,300 on a loan for the Sunbird. Wilde offered Kolupar $8,995 for the Sunbird, and she paid off the balance of her debt for the Sunbird in cash. Kolupar then financed $8,600, the purchase price of the Mercedes, with another loan from a local lender. Thompson was her salesperson for all transactions.

¶3 Kolupar later discovered that the Mercedes had not been owned by Wilde, but by Thompson personally. Although the Mercedes was on Wilde's lot, Thompson had purchased the vehicle from Wilde approximately six months earlier for a little over $5,700. Wilde had no policy prohibiting its sales representatives from selling their personally-owned vehicles on its lot.

¶4 After purchasing the Mercedes, Kolupar soon found that the vehicle had a number of mechanical problems, including starting and stalling problems. She also discovered that the odometer operated only intermittently, resulting in an inaccurate mileage display. Kolupar finally sold the Mercedes late in the summer of 1994 for $2,000. On March 29, 2000, Kolupar sued Wilde and Thompson

alleging fraud, violations of federal and state odometer laws, breach of express and implied warranties, and violations of Wisconsin's motor vehicle statute, WIS. STAT. § 218.01 (1993-94). A special discovery referee was appointed by the trial court to oversee any discovery disputes if they should arise. Eventually, the parties were able to reach an agreement and settle the case. On December 13, 2001, Kolupar accepted $6,600 plus taxable costs to settle her substantive claims against Wilde and Thompson.

¶5 Unfortunately, between the time of the filing of the complaint and entry of the final judgment, this case ballooned into a morass of discovery disputes, ineffective communication, and general inefficiency. Throughout these discovery disputes, Kolupar's attorney's fees continued to swell, eventually amounting to nearly $53,000 in attorney fees and costs, and, after the settlement had been reached, she and her counsel requested that the defendants reimburse these fees and costs pursuant to WIS. STAT. § 218.01(9)(b) (1993-94).[1]

¶6 The trial court was left with the daunting task of untangling the messy record in order to determine the amount of reasonable attorney fees and costs to which Kolupar and her counsel were entitled. A hearing was scheduled to determine Kolupar's attorney's fees. It was set for May 13, 2002, and May 14, 2002. At the outset of the hearing, Kolupar offered into evidence an invoice itemizing her attorney's fees and litigation expenses. The trial court refused to

[1] WISCONSIN STAT. § 218.01(9)(b) (1993-94) states, in relevant part: "Any retail buyer suffering pecuniary loss ... may recover damages for the loss in any court of competent jurisdiction together with costs, including reasonable attorney fees." WISCONSIN STAT. § 218.01(9)(b) has been renumbered as WIS. STAT. § 218.0163(2) (2001-02).

accept this document into evidence because it concluded that its submission did not comply with Milwaukee County Local Rule 365(a), which states:

> If a movant desires to file a brief, affidavit, or other documents in support of a motion other than one for summary judgment or dismissal, such motion and supporting materials shall be received by all counsel of record and/or parties not represented by counsel of record and filed with the deputy court clerk of the assigned judge no later than ten (10) calendar days (including Saturdays, Sundays and holidays) before the time specified for the hearing.

The trial court refused to accept the invoice into evidence because opposing counsel had not received a copy of the document until Friday, May 10, 2002, for the hearing being held on Monday, May 13, 2002. Although the trial court would not accept the invoice into evidence, it did not dispute the amount of time that Kolupar's attorney spent on her case. During the hearing on May 13, 2002, the trial court acknowledged: "I want to make it [ ] perfectly clear [that] I am absolutely certain that counsel put in exactly the amount of time on this case that he says. That is not in doubt.... I am satisfied counsel put in every second that he said he put in on this case."

¶7 At the conclusion of the attorney fees hearing, the trial court awarded Kolupar $15,000 in fees and costs. In rendering its decision, the trial court relied, in part, on the recommendation of the discovery referee. The discovery referee, Frank T. Crivello, a former circuit court judge, gave the following testimony:

> [THE COURT]: You are appointed ... to serve as special master and corral some of the discovery issues here.
>
> [THE WITNESS]: Yes, your Honor.
>
> [THE COURT]: And you are aware of what the plaintiff is asking for attorney's fees?

[THE WITNESS]: My understanding is that it is $53,000.00

[THE COURT]: Can you give me some of your observations, please?

[THE WITNESS]: Judge, I conducted three formal discovery hearings in this case.... Between those hearings I also dealt with a flurry of correspondence and telephone calls from counsel regarding the wording of orders following those hearings.

....

In thirty years in [the] practice of law, as well as fifteen years as a circuit judge myself[,] I have never seen a $6,000.00 case grow barnacles the way this one has.

....

I have served as special master in cases on numerous occasions here in Milwaukee County since leaving the bench. The only case that I have seen that approached this magnitude was ... a multi-million dollar insurance case with fifteen defendants, including one British defendant. So without ... going through every page of the several thousand pages I have in my possession, I recall three or four instances where I sanctioned [Kolupar's attorney] myself by barring the presentation of testimony, or documents, or witnesses.

....

Having examined the case in terms of discovery and evidence over the course of three hearings and months of correspondence, I think that the discovery and evidentiary issues in this case were grossly inflated. This was a two-person transaction for an automobile....

....

... So I would ... adopt the offer in judgment and award the plaintiff the $6,600.00, which apparently she has accepted, and I would award $15,000.00 from the defendant to the plaintiff in fees. And that is how I would dispose of this case if I were asked to.

I am troubled – and I don't mean to be offensive to these lawyers, who[m] I have a great deal of professional respect for.... And I don't think this case is worth much more than

> [$]15,000 in fees. Although I know both sides spent a lot more time than that.
>
> When lawyers decide to do that, then they bear the onus of that decision.

In rendering its decision, the trial court stated:

> Like [counsel] said, this matter was over-tried. The long and short of it, it comes down to – I appreciate [the discovery referee's] recommendation. I think it's appropriate. I happen to concur with it.
>
> In my discretion I believe that there is entitlement for reasonable attorney's fees on behalf of the plaintiff. Reasonable attorney's fees in my mind of $15,000....

On June 3, 2002, Kolupar filed a motion for reconsideration, which was later denied by the trial court.

II. ANALYSIS.

A. The trial court correctly excluded the invoice.

¶8 "The admissibility of evidence is directed to the sound discretion of the trial court, and we will not reverse the trial court's decision ... if there is a reasonable basis for the decision and it was made in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Brewer***, 195 Wis. 2d 295, 305, 536 N.W.2d 406 (Ct. App. 1995) (citation omitted). Milwaukee County Local Rule 365(a) clearly requires that any papers in support of the moving party's position must be filed at least ten days before the scheduled motion hearing. This rule is "valid and enforceable." ***Community Newspapers, Inc. v. City of West Allis***, 158 Wis. 2d 28, 33, 461 N.W.2d 785 (Ct. App. 1990) ("We conclude that Local Rule 365 reasonably furthers the courts' interest in efficient judicial administration and is, therefore, valid and enforceable.").

¶9 Kolupar contends that Local Rule 365 applies only to motion hearings, and because the proceedings in question were the result of the request for attorney fees rather than in furtherance of any motion, Local Rule 365 is inapplicable. Kolupar first requested attorney fees in her complaint; however, she scheduled a hearing seeking a determination of attorney fees on May 10, 2002, over two years after filing the initial complaint. The petition for a hearing was accompanied by a written request, stating:

> **PLEASE TAKE NOTICE** that the plaintiff named above, Tammy Kolupar, will, on the 13th day of May, 2002 at 10:00 a.m. (the date and time set by the Court for consideration of this issue) request an award to her, as the prevailing party, of her attorney's fees and the litigation expenses necessitated by the prosecution of this action, at a hearing to be conducted before the Honorable Thomas R. Cooper, Circuit Court Judge, presiding.

¶10 A "motion" has been defined as an "application for an order." ***State ex rel. Webster Mfg. Co. v. Reid***, 177 Wis. 612, 616, 188 N.W. 67 (1922). Thus, we conclude that the trial court properly applied Local Rule 365 because Kolupar's May 10, 2002 petition for attorney fees was a motion seeking a court order requiring Wilde to pay her attorney's fees. Thus, no error occurred in refusing to consider the invoice. Furthermore, the implicit rationale of the local rule supports the trial court's decision. The rule attempts to insure that the parties are completely prepared to argue their positions prior to the hearing and guards against the possibility that one side will be "ambushed" by new material.

¶11 Moreover, we also conclude that any potential error in refusing to admit the invoice into evidence was harmless. "An erroneous exercise of discretion in admitting or excluding evidence does not necessarily lead to a new trial." ***Martindale v. Ripp***, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698. WISCONSIN STAT. § 805.18(2) (2001-02) provides:

> **805.18 Mistakes and omissions; harmless error.**
>
> ....
>
> **(2)** No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

WISCONSIN STAT. § 901.03 (2001-02) also provides:

> **901.03 Rulings on evidence. (1)** EFFECT OF ERRONEOUS RULING. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.

Here, the trial court, as well as the discovery referee, never disputed Kolupar's counsel's claim that he worked sufficient hours to amass $53,000 in fees and costs. Rather, the question presented was whether the fees claimed were reasonable. Thus, any potential error in excluding the invoice was harmless.

B. The trial court did not err in relying on the referee's recommendation.

¶12 Kolupar next claims that the trial court erred in relying on the discovery referee's recommendation. Kolupar concludes that the "[trial] court's reliance on [the discovery referee] was risky not only because of his limited familiarity with the proceedings, but also because [his] legal reasoning was flawed." We disagree.

¶13 First, our review of the record indicates that the discovery referee was quite familiar with the discovery disputes about which he was questioned. Second, the discovery referee was also able to offer insight into the general

demeanor of the attorneys and their efficiency, or lack thereof. Third, and finally, WIS. STAT. § 805.17 (2001-02) explicitly allows a trial court to rely upon the findings of a referee:

> **805.17 Trial to the court.**
>
> ....
>
> **(2)** EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the ultimate facts and state separately its conclusions of law thereon. The court shall either file its findings and conclusions prior to or concurrent with rendering judgment, state them orally on the record following the close of evidence or set them forth in an opinion or memorandum of decision filed by the court.... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. *The findings of a referee may be adopted in whole or part as the findings of the court....*

(Emphasis added.)

¶14 "The findings of the referee when confirmed by the court become the findings of the court." ***MacPherson v. Strand***, 262 Wis. 360, 366, 55 N.W.2d 354 (1952). Because the findings of the trial court are not to be disturbed unless against the great weight and clear preponderance of the evidence, and the record here contains sufficient evidence to support the findings of the referee as adopted by the court, under the rule cited above, we will not disturb the trial court's reliance on the referee's findings. *See* ***id.***

C. The trial court applied a correct legal standard.

¶15 "[C]ourts have the inherent power to determine the reasonableness of attorney's fees." ***Herro, McAndrews & Porter, S.C. v. Gerhardt***, 62 Wis. 2d 179, 182, 214 N.W.2d 401 (1974). "Our review of the circuit court's

determination of the value of attorney's fees is limited to determining whether the circuit court properly exercised its discretion." ***Village of Shorewood v. Steinberg***, 174 Wis. 2d 191, 204, 496 N.W.2d 57 (1993).

> [T]he supreme court [has] recognized that the trial court is in an advantageous position to decide the reasonableness of requested attorney's fees. It is the trial court that observes the quality of legal services rendered, it is aware of the costs incurred in operating a law practice, and it knows or can readily find out the going rate for legal services in the community. Accordingly, we will give deference to the trial court's exercise of discretion.

Aspen Servs., Inc. v. IT Corp., 220 Wis. 2d 491, 495, 583 N.W.2d 849 (Ct. App. 1998) (footnote and citations omitted).

¶16 A trial court has discretion to hold a hearing to determine the amount of fees and expenses to be awarded. *See* ***Narloch v. DOT***, 115 Wis. 2d 419, 437, 340 N.W.2d 542 (1983). "[I]n awarding only reasonable fees, the court may consider whether costs could have been avoided by a reasonable and prudent effort." ***Aspen***, 220 Wis. 2d at 499. "This premise has been interpreted to mean that [a] plaintiff may not unnecessarily run up its legal bill in the expectation that the breaching party will ultimately pick up the entire tab." ***Id.*** (citation omitted). Furthermore, the trial court may consider whether the final judgment is out of proportion to the attorneys fees that were generated in the case and whether the resultant verdict justifies the amount of money expended. *See* ***id.*** at 497 n.5. Finally, SCR 20:1.5 lists additional factors that may help a trial court determine the reasonableness of an attorney's fee. *See* ***Steinberg***, 174 Wis. 2d at 205. SCR 20:1.5(a) states:

> A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

¶17 In rendering its decision, the trial court aptly summarized the situation and properly applied many of the relevant factors:

> There is no formula – kind of thumbnail or formula that I operate under. ... [T]he state legislature clearly intended in a number of different areas for fee-shifting statutes to cover those situations where a little guy can take on the big guy. And this is one of those cases where the fee-shifting statute comes into play and creates [an] obligation on behalf of Wilde Pontiac.
>
> There is no question [that] this case was over-tried. Discovery was over – well over-done. It was over-[pled] right from the get-go on the complaint. There was the shotgun pleading where everything was [pled] against Wilde short of conquering Europe during World War II.
>
> ... [T]he daunting discovery mountain was created right from the get-go....
>
> I am satisfied that ... the majority of [the discovery deadlines that were missed] were missed by plaintiff's counsel. I think that is what [the discovery referee] intimated in his discussions and his recommendation....

> I am persuaded that the state legislature wants the little guy to be able to ... go against the big guys, but at the same time that statute doesn't create a blank check where whatever is spent must be covered by the wrongdoer.
>
> ...
>
> ... [T]his matter was over-tried. ... [I] appreciate [the discovery referee's] recommendation. I think it's appropriate. I happen to concur with it.
>
> ... Reasonable attorney's fees in my mind [are] $15,000.00. I am ordering $15,000.00 ... for attorney's fees and costs....

Thus, the trial court properly considered many of the relevant factors, including the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, the amount involved, and the results obtained. The trial court also properly considered whether the costs could have been avoided by a reasonable and prudent effort.

¶18 In ***Aspen***, we approved the trial court's decision to reduce fees, observing that deference to the trial court's award was appropriate because the award was reduced to promote the civility of litigation. ***Aspen***, 220 Wis. 2d at 495-96. Like the dispute in ***Aspen***, the case at hand was "a relatively simple contract case [that] 'burgeoned' into something in which the attorney's fees were out of proportion to the result." ***Id.*** at 496. The finding that there was excessive litigation justifies the trial court's reduction of Kolupar's requested attorney fees and costs. *See* ***id.*** at 497.

D. The trial court did not deny taxable costs.

¶19 Finally, Kolupar contends that the trial court denied her taxable costs despite the offer of judgment made and accepted pursuant to WIS. STAT. § 807.01(1), which provided that Wilde would pay "the sum of Six Thousand Six

Hundred ($6,600) Dollars *plus the taxable costs of the action*." (Emphasis added.) Kolupar concludes that the trial court ordered a judgment that contravened this settlement because the resulting judgment expressly excluded taxable costs. While we agree with Kolupar that the June 24, 2002 final judgment expressly excluded costs, we conclude that this exclusion was the result of a clerical error, in that both the trial court's May 14, 2002 oral decision and its June 6, 2002 order for judgment expressly provided that the $15,000 award included both attorney fees *and* costs.[2]

¶20 When Kolupar accepted the defendant's offer of settlement, she also explained via correspondence filed on January 2, 2002, that the amount of costs, including attorney fees and litigation expenses, would be determined at a later date:

> [P]ursuant to Sec. 218.01(9) (1994) ... awards of "costs [include] a reasonable attorney fee."
>
> Since this offer will apparently resolve plaintiff's primary claim for damages, it would appear all that would be needed in this case is a hearing to determine the reasonableness and necessity of plaintiff's attorney['s] fees and litigation expenses....
>
> Therefore ... plaintiff accepts defendant's offer of judgment in the amount of $6,600.00, subject only to a determination of plaintiff's costs including a reasonable attorney fee....

¶21 Following this correspondence, the trial court held hearings to determine the amount of costs, including reasonable attorney fees. At the

[2] We remand the matter to the clerk of the circuit court for correction of the June 24, 2002 final judgment to correspond with the language of the order for judgment dated June 6, 2002.

conclusion of the hearings, the trial court clarified that the $15,000 judgment included both attorney fees and costs: "Reasonable attorney's fees in my mind [are] $15,000.00. I am ordering $15,000.00 fee to plaintiff *for attorney's fees and costs* that was originally submitted as an offer of judgment." (Emphasis added.) Counsel for Kolupar then further clarified the trial court's decision:

> [KOLUPAR'S ATTORNEY]: As to the costs?
>
> [THE COURT]: Fees and costs, $15,000.00.

In the June 6, 2002 order for judgment, the trial court again made it very clear that the $15,000 judgment included both fees and costs: "That judgment be entered in favor of plaintiff and her attorneys ... in the amount of $15,000.00, which sum represents attorney fees and costs...."

¶22 The judgment entered on June 24, 2002, however, does not accurately reflect the trial court's order. It states: "The Court having issued its Order for Judgment, judgment is hereby entered in favor of plaintiff, Tammy L. Kolupar, and her attorneys ... in the amount of Fifteen Thousand Dollars ($15,000.00), but no costs." Therefore, although the trial court clearly ordered $15,000 in fees and costs, the final judgment misstates the order as $15,000 in fees without costs. Accordingly, we affirm the judgment and remand this matter to the clerk of circuit courts for correction of this error.

By the Court.—Judgment affirmed and cause remanded with directions.

Recommended for publication in the official reports.

¶23 FINE, J. (*dissenting*). Wilde Pontiac Cadillac, Inc., and its employee Randall Thompson not only took advantage of an eighteen-year-old woman but they also delayed and obfuscated the litigation process.[1] Indeed, from my review of the record, I believe that they pursued a scorched-earth Rambo-litigation policy that has no place in our justice system.

¶24 Kolupar submitted a fee and cost request for approximately $53,000, of which only $41,000 was for attorneys fees. Moreover, of the approximately $12,000 in costs, $3,600 was for the following expenses that, in all but extraordinary cases, the justice system should provide to litigants without cost: mediation expenses of $1,250, and $2,350 as payment to the discovery master. Significantly, neither the Majority nor the trial court disputes that Kolupar's lawyer both:

> (1) spent the time (and incurred the expenses) working on the case as reflected by the fee request, and
>
> (2) that the fee request represents a fair hourly rate for the lawyer's time.

Yet, the Majority defers to the unfocused musings by both a former judge, appointed to oversee a small part of the discovery disputes in this case, and the trial court.

---

[1] During the evidentiary hearing held by the trial court on the attorneys-fee issue, when Kolupar's lawyer asked her why she filed the lawsuit, the trial court interrupted: "Let's get to the point, counsel. I know what the case is about. She got defrauded." Randall Thompson's lawyer interjected "[a]llegedly," and the trial court repeated that word, "[a]llegedly." Neither the trial court's tone nor its demeanor is, of course, a matter of record.

¶25 Kolupar sought her attorneys fees under a fee-shifting statute. The purpose of fee-shifting statutes is to level the litigation playing field so that aggrieved citizens like Kolupar are not barred at the courthouse door by the daunting prospect that the legal costs will outweigh any recovery. *See* ***Hughes v. Chrysler Motors Corp.***, 197 Wis. 2d 973, 985, 542 N.W.2d 148, 152 (1996). If the Majority's decision is allowed to stand, persons like Kolupar will justifiably not only pause with trepidation at the courthouse entrance but, indeed, only the most stalwart will not turn and go away. Thus, despite what they have done, Wilde and Thompson and those like them will have won. I respectfully dissent.

A. *Wilde and Thompson forced Kolupar's lawyer to spend the time on the case that he did.*

¶26 As the Majority recounts, the former judge was appointed to be discovery master. He served for four months. When the trial court asked him to give an opinion on the fee request, the former judge replied that the case grew "barnacles." It did. It did because Wilde and Thompson threw obstacles in Kolupar's path that would make James Bond and his nails- and oil-disgorging Astin-Martin green with envy. Some examples:

- Before Kolupar brought this action she offered to settle the case for $13,000, which was, essentially, her out-of-pocket costs at the time. Wilde did not make any counteroffer. Thus, Kolupar had to sue in order to get justice.

- Once suit was brought, Wilde answered, alleging that Kolupar's complaint was frivolous within the meaning of WIS. STAT. § 814.025. In my view, the charge that Kolupar filed a frivolous complaint is, itself, frivolous.

- Kolupar's action was brought in Milwaukee County, which was an appropriate venue. Wilde

filed a motion to change venue to Waukesha County. That motion was denied.

- The motion by Wilde to change venue argued that the "only ... rationale" for filing the case in Milwaukee County was because jury verdicts, as argued in the motion, are more "generous" in Milwaukee County than Waukesha county. This is *not* a recognized ground to change venue, and the Majority does not contend that it is. Moreover, Kolupar had not even demanded a jury trial.

- The trial court held a hearing on the motion by Wilde to change venue. Kolupar and Wilde filed briefs before and after the hearing.

- In its answer, Wilde denied that Thompson was a Wilde manager as Kolupar had alleged in her complaint. Understandably, Kolupar then sought from Wilde *via* discovery Thompson's employment file with Wilde. Kolupar also sought Wilde's files concerning a car that Kolupar had purchased from Wilde several years earlier and had used as a trade-in for the car that is the subject of this lawsuit, as well as Wilde's file in connection with Kolupar's purchase of the second car. In the face of these perfectly reasonable discovery requests, Wilde and Thompson stonewalled. Kolupar requested the documents in mid-July of 2000. Kolupar was forced to file two motions to compel discovery, which were heard on September 25, 2000, and November 27, 2000. On October 13, 2002, the trial court granted the motion to compel, and the order required that all the documents be produced within thirty days. They were not. At the second hearing, on November 27, Wilde's attorney angrily exclaimed to the trial court that "this is ridiculous that we're here. I have produced every document." Yet, by letter dated December 7, 2000, Wilde's lawyer finally produced the missing documents.

- An egregious, and sleazy, example of the Rambo tactics Wilde used is that Wilde's lawyer deposed one of Kolupar's friends about Kolupar's employment as a topless dancer and Kolupar's desire to have breast-augmentation implant surgery.

- Wilde filed a motion for summary judgment, to which Kolupar had to respond. The trial court denied the motion.

- The trial court ordered the parties to attend two mediation sessions. This, too, added to the time and expense. Wilde let the first mediation session go by without making *any* settlement offer. After the second mediation session, it made its first offer, for $6,600. Kolupar accepted this offer after she was able to persuade the bank that held the security interest in her first car (the trade-in) to accept the $6,600 as payment in full of the bank's judgment for $10,000 plus accruing interest, which, apparently, by the time of the settlement, approached approximately $20,000.

B. *The trial court never considered the factors governing the setting of attorneys fees under a fee-shifting statute.*

¶27 In ¶16, the Majority opinion sets out the factors governing a trial court's exercise of discretion in awarding attorneys fees. It is true, of course, that an award of attorneys fees is within the trial court's discretion, but that discretion "must, in fact, be exercised." ***Stathus v. Horst***, 2003 WI App 28, ¶14, 260 Wis. 2d 166, 173–174, 659 N.W.2d 165, 168. This was not done here. The trial court here never considered on the record any of the factors. Rather, it deferred to the off-hand assessment of the former judge who, as the Majority notes, was only appointed to be a discovery master. The trial court's abdication of its responsibility was palpable, as reflected by the transcript in the record:

> I am going to ask Mr. Crivello [the former judge] to make a recommendation to the Court in front of you folks as to how I should handle this because I think that is his -- I can ask for that as the special master, and because of his rather detailed greater information than this Court has.

And on what did the discovery master rely in making his recommendation? Well, the Majority sets it all out in ¶7:

- His "thirty years in [the] practice of law, as well as fifteen years as a circuit judge." The retired judge graduated from law school in 1973, http://www.wisbar.org/lawyersearch/resdetails.asp?

ID=1008232 (last accessed June 04, 2003), so the "fifteen years as a circuit judge" is included in the "thirty years."

- He "conducted three formal discovery hearings in this case," plus the ancillary correspondence and telephone calls. He did not preside over and was not involved in the change-of-venue hearing or the summary-judgment proceeding.

- The former judge admitted that his involvement in the case was limited and that he only was involved for some four months.

- Wilde suggested the $15,000 figure, and the former judge adopted it without any analysis beyond his view that more was not warranted because, with Kolupar's acceptance of the $6,600 offer of settlement, the case was "just barely above a small claims case."

¶28 In accepting the former judge's off-the-cuff "recommendation," the trial court refused to look at the extensive documentation submitted by Kolupar in support of her request for attorneys fees and related costs. The trial court relied on Milwaukee County Circuit Court Local Rule 365, and the Majority validates that reliance. The rule, however, governs "motions"; it does not apply to exhibits offered at trials or evidentiary hearings. Kolupar never filed a motion for attorneys fees; the statute permits them and she demanded them in her complaint. Indeed, the trial court *sua sponte* set the hearing on the attorney-fees matter: "We'll all meet back here on the date set for trial to the court on May 13th and we'll consider the attorneys' fee issue."

¶29 The majority approves of the trial court's acceptance of the former judge's recommendation because, in its view, such acceptance is sanctioned by WIS. STAT. RULE 805.17. But RULE 805.17(2) provides that a referee's "findings ... may be adopted in whole or part as the findings of the [trial] court." The former judge was appointed to be a discovery master only—he was *not* appointed to

assess Kolupar's fee request; he held *no* hearings, examined *no* evidence, and made *no* "findings."

¶30 As we have seen, the former judge based his recommendation in part on his view that Kolupar's acceptance of the belated $6,600 settlement offer made the matter "just barely above a small claims case." But the amount of recovery is *not* a measure of what the fee-shifting award should be in these types of cases:

> Often the amount of pecuniary loss is small compared with the cost of litigation. Thus, it was necessary to make the recovery large enough to give tenants an incentive to bring suit. The award of attorney fees encourages attorneys to pursue tenants' claims where the anticipated monetary recovery would not justify the expense of legal action.

Shands v. Castrovinci, 115 Wis. 2d 352, 358, 340 N.W.2d 506, 509 (1983).

¶31 The trial court also justified its minimal award of attorney fees to Kolupar because "[t]he flip side is Wilde has to swallow whatever fees they have." Neither the trial court nor the Majority cites any authority for this startling proposition—that a rich defendant can frustrate at every turn a poor plaintiff's quest for justice and then say when the fee-shifting day of reckoning has arrived, "I have substantial attorneys fees myself, I shouldn't also have to pay the plaintiff's."

¶32 The trial court's adoption of the former judge's "just barely above a small claims case" rationale, as well as the trial court's consideration of the "flip side" of Wilde's own fees will, because the Majority has sanctioned it in a decision that is recommended for publication, gut the fee-shifting statutes. The statutes, as noted by ***Shands***, were designed to keep open the courthouse doors to persons whose claims do not justify the retention of a lawyer *unless*, by prevailing, that person can recover his or her attorneys fees.

¶33 In my view, the trial court not only erroneously exercised its discretion in setting the attorneys fees and related costs at $15,000, it did not exercise *any* discretion. Neither the former judge nor the trial court pointed to *anything* that Kolupar's lawyer did that was not justified by the case—beyond their imbricating hunches. The law requires more.

¶34 No one disputes that Kolupar's lawyer did what he said he did and that his hourly rate was reasonable. In light of this, I would reverse the judgment and award to Kolupar the fees and costs she requested.

¶35 I respectfully dissent.

APPENDIX 2

COPY

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

TAMMY KOLUPAR,

Plaintiff,

vs.

WILDE PONTIAC, CADILLAC, INC., a Wisconsin corporation, and RANDALL THOMPSON,

Defendants.

Case No. 00 CV 002571

Code No. 30703

FILED

JUN - 6 2002

JOHN BARRETT
Clerk of Circuit Court

ORDER FOR JUDGMENT

The above-captioned matter having come on for a bench trial before me on the 13th and 14th days of May, 2002, on plaintiff's claims that her principal causes of action were settled by virtue of plaintiff's acceptance of a statutory Offer of Judgment under Wis. Stat. § 807.01(1), and plaintiff's claims for actual and reasonable attorney fees pursuant to Wis. Stat. § 218.01(9)(b) (1994). The Court having heard the testimony of witnesses called by the parties and having reviewed the records, files, and pleadings on file herein, and having made certain findings of fact as detailed on the record, hereby orders as follows:

Now, therefore,

IT IS HEREBY ORDERED:

1. That judgment be entered in favor of plaintiff, Tammy L. Kolupar, and against the defendant, Wilde Pontiac, Cadillac, Inc., by virtue of a statutory Offer of Judgment by defendant, Wilde Pontiac, Cadillac, Inc., and be entered, jointly and

EXHIBIT

tabbies

1

LAW OFFICES OF
CRAMER, MULTHAUF
& HAMMES, LLP
1601 E. RACINE AVENUE
WAUKESHA, WI 53186

severally, in favor of said plaintiff and against defendant, Randall Thompson, by defa
in the amount of Six Thousand Six Hundred ($6,600) Dollars.

2. That judgment be entered in favor of plaintiff and her attorneys, Lisko & Erspamer, S.C., and against defendants, Wilde Pontiac, Cadillac, Inc. and Randall Thompson, jointly and severally, in the amount of $15,000.00, which sum represents attorney fees and costs, which sum represents the Court's determination of reasonable attorney fees allowed to plaintiff pursuant to Wis. Stat. § 218.01(9)(b) (1994

Dated this 6 day of June, 2002.

BY THE COURT:

The Honorable Thomas R. Cooper,
Circuit Court Judge Presiding

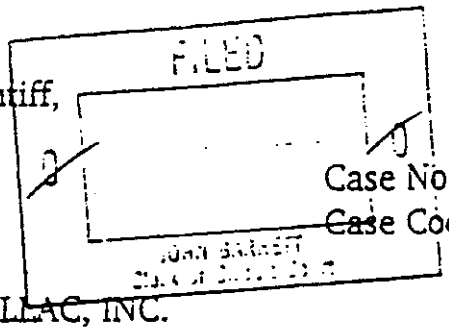
ts\ksg\clients\wilde\pontiac\kolupar\pid-final Order

APPENDIX 3

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

TAMMY KOLUPAR,

Plaintiff,



Case No. 00-CV-2571
Case Code: 30703

vs.

WILDE PONTIAC, CADILLAC, INC.
and RANDALL THOMPSON,

Defendants.

JUDGMENT

The Court having issued its Order for Judgment, judgment is hereby entered in favor of plaintiff, Tammy L. Kolupar, and against defendant, Wilde Pontiac, Cadillac, Inc., by virtue of an accepted statutory Offer of Judgment by defendant, Wilde, and judgment is entered in favor of plaintiff, Tammy Kolupar and against defendant, Randall Thompson, by default, jointly and severally, in the amount of Six Thousand Six Hundred Dollars ($6,600.00), without costs.

Dated at Milwaukee, Wisconsin this 24 day of June, 2002.

BY THE COURT:

John Barrett
Clerk of Circuit Court

By: _____
~~Deputy Clerk~~ JUDGMENT CLERK

EXHIBIT
2

APPENDIX 4

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

TAMMY KOLUPAR,

Plaintiff,

FILED

Case No. 00-CV-2571
Case Code: 30703

vs.

WILDE PONTIAC, CADILLAC, INC. and RANDALL THOMPSON,

Defendants.

JUDGMENT

The Court having issued its Order for Judgment, judgment is hereby entered in favor of plaintiff, Tammy L. Kolupar, and her attorneys, Lisko & Erspamer, S.C., and against defendant, Wilde Pontiac, Cadillac, Inc., and Randall Thompson, jointly and severally, in the amount of Fifteen Thousand Dollars ($15,000.00), but no costs.

Dated at Milwaukee, Wisconsin this 24 day of June, 2002.

BY THE COURT:

John Barrett
Clerk of Circuit Court

By: ~~Deputy Clerk~~ JUDGMENT CLERK

EXHIBIT
3

APPENDIX 5

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

TAMMY KOLUPAR,

Plaintiff,

vs.

Case No. 00-CV-2571
Case Code: 30703

WILDE PONTIAC, CADILLAC, INC.
and RANDALL THOMPSON,

Defendants.

ORDER ARISING FROM PLAINTIFF'S MOTION FOR DISCOVERY SANCTIONS

The parties having appeared before me on November 27, 2000 on a motion filed by the Plaintiff, Tammy Kolupar, seeking discovery sanctions against the Defendant, Wilde Pontiac, Cadillac, Inc., based upon an assertion that Defendant, Wilde Pontiac, Cadillac, Inc., has failed to fully and completely provide documents in its possession relating to any transaction between Defendant and Plaintiff involving a 1985 Mercedes Benz and a 1993 Pontiac Sunbird motor vehicle.

The Court having heard the arguments of counsel and having reviewed the materials and affidavits filed by the parties, now makes the following Order:

1. Based upon the assertions of Defendant's counsel that Defendant, Wilde Pontiac, Cadillac, Inc., has no more documents other than those already provided, the motion by Plaintiff for discovery sanctions shall be held in abeyance, without costs to either party;

2. Defendant, Wilde Pontiac, Cadillac, Inc., is and will be barred from introducing, admitting or otherwise utilizing any documents relating to said Mercedes or said Pontiac not heretofore disclosed to Plaintiff, for purposes of

FEB 15 2001

admissibility at trial, for purposes of cross examination or for any other purpose whatsoever, including impeachment;

3. If it is subsequently shown to the Court's satisfaction that Defendant has withheld documents requested by Plaintiff, the Court reserves the right to impose additional sanctions and remedies, including default judgment and including sanctions against the offending attorney;

4. That Plaintiff, Tammy Kolupar, and Defendant's general manager, James Vanderfeld, will both appear for deposition on December 12, 2000, as scheduled by the parties in open Court;

5. That the deposition scheduled for Randall Thompson on Thursday, November 30, 2000 is hereby cancelled. Mr. Thompson's deposition will be rescheduled at a time convenient for all the parties, said deposition to be scheduled no later than the close of business on Monday, December 4, 2000; and

6. That any further discovery disputes between the parties will be referred by the Court to be heard and decided by a special master, who will be retired Circuit Judge, Honorable Frank T. Crivello. Judge Crivello will be paid for his time at his usual mediation billing rate, ~~with all costs of Judge Crivello's time to be paid by the non-prevailing party in any dispute decided by him.~~ by both parties equally. The Court retains jurisdiction to allocate the cost of Judge Crivello's time at the time of trial. MM -2-14-01

Dated at Milwaukee, Wisconsin this 14 day of December, ~~2000.~~ February 2001

BY THE COURT:

Michael ~~S.~~ Malmstadt
Circuit Judge, Br. 39

APPENDIX 6

All right. I have terminated Judge Crivello's testimony under 904.03. It's just cumulative, wasting time. Enough's enough. I do, however -- you are the special master and I would like you to make a recommendation to the Court on what the Court should do so that the parties can present testimony and respond to it in their argument.

Judge Crivello.

MR. CRIVELLO: If it please the Court. As the Court knows, I have spent a considerable amount of time on this case as a quasi judicial officer, and I have a lot of experience in this area.

Just to put my recommendation into some context, this is a case which would ultimately settle for, I understand, $6,600.00. This is just barely above a small claims case.

Having examined the case in terms of discovery and evidence over the course of three hearings and months of correspondence, I think that the discovery and evidentiary issues in this case were grossly inflated. This was a two-person transaction for an automobile. This wasn't Arch Diocese versus Lloyds of London, for example.

My fees on this case get to be more than the amount of the case. My fees as special master. I think that in a situation like this in my opinion the Court should do equity. And in my opinion equity in this case is this:

I think that the sensible way to dispose of this matter would be to reject the fee submission as not timely filed. You ordered it in February -- February 25th. Was submitted last week, as I understand.

And in my judgment that is typical of the kind of things that occurred in this case. So I would disallow the fee petition and I would adopt the offer in judgment and award the plaintiff the $6,600.00, which apparently she has accepted, and I would award $15,000.00 from the defendant to the plaintiff in fees. And that is how I would dispose of this case if I were asked to.

I am troubled -- and I don't mean to be offensive to these lawyers, who I have a great deal of professional respect for, but I am troubled with the notion of hanging up an agreement that benefits the plaintiff and which the plaintiff was to obtain because of this fee issue. And I don't think the case is worth much more than 15,000 in fees, frankly. Although I know both sides spent a lot more time than that.

When lawyers decide to do that, then they bear the onus of that decision. And I guess that is all I have to say, Judge.

THE COURT: Thank you, Judge Crivello. I appreciate your recommendation. Appreciate your service on this case, your patience. And you are free to go and pick

up your son.

MR. CRIVELLO: Thank you, your Honor.

THE COURT: I am going to leave the room for five minutes and let the two lawyers talk to themselves based upon the recommendation of Judge Crivello. Then we'll recommence.

(Pause.)

THE COURT: All right, back on the record. It doesn't look like the parties wish to take Judge Crivello's recommendation and consideration.

All right. It is 3:30. We got another hour, hour and a half. Is there any other witnesses?

MR. ERSPAMER: We'd call Tammy Kolupar, the plaintiff.

THEREUPON,

TAMMY KOLUPAR,

the plaintiff herein, having been first duly sworn, was examined and testified as follows:

THE COURT: Have a seat. State your name; spell it for the record.

THE WITNESS: Tammy Lynn Kolupar, K-o-l-u-p-a-r.

MR. LISKO: Your Honor, this is David Lisko. I am going to be doing the questioning of this witness.

DIRECT EXAMINATION

APPENDIX 7

to tell you that the deal was for 20,000.00. What I am trying to let the Court know is that in exchange for the $6,600.00 going to the bank this $20,000.00 judgment, which is what it is now, is paid off. And so that would go to the proportionality of the fees, or of the settlement versus the fees, 'cuz I think there is an issue here about this is really --

THE COURT: No. The issue -- counsel, the issue -- and I understand, but that is not the theory that I am operating under. The theory that I am operating under is that there was an enormous waste of time because people couldn't cooperate and get the discovery done, and the fees were run up. And the issue is what are reasonable fees under the Aspen case, which is very persuasive; is very -- Aspen Services Incorporated versus IT Corporation, 220 Wis. 2d 491 before Bob Mawdsley, a friend of mine; was a good judge, smart. He teaches at the Judicial College on a regular basis. He established that. And he appointed a referee, as was done here. And it is a question that it is not a blank check that whatever attorney's fees are run up on a case, and if there is, you know, a finding pursuant to statute, and I am persuaded that the statute you cite in your brief is controlling, that there is reasonable attorney's fees that are due. But it's reasonable attorney's fees, and it's not all the attorney fees that

EXHIBIT

4

ever could be charged. It is not a blank check.

I have to make a determination as to what reasonable attorney's fees are. And Judge Crivello in his recommendation and in his testimony said that there was too much wasted time on these issues that should have been resolved at a lesser fee. And I think that is the basis for his recommendation. So that is what I want to focus in on in the determination.

MR. LISKO: All right.

Q Ms. Kolupar, did you have the financial wherewithal to to to fight with Wilde Pontiac over this car?

MS. GUTENKUNST: Your Honor, I am going to object.

THE COURT: That is relevant. She can answer. The answer's no, right?

THE WITNESS: Yes, I answered no.

MR. LISKO:

Q And can you describe for the Court what is your opinion of the representation that you received by Mr. Erspamer?

A Mr. Erspamer has done a wonderful job. This has been going on a long time. He's put a lot of time and effort into representing me.

THE COURT: As long as you're in that line of questioning, I want to make it also perfectly clear I am

APPENDIX 8

and it only goes to 30.

MR. ERSPAMER: The billing I have and we're offering is $52,703.09, your Honor. And as far as blocked billing, it is an itemized billing that shows the amount of hours for each entry on it. It is down to the tenth of an hour.

"Respond to letter of Ms. Gutenkunst, point seven at 145 an hour. Telephone conference with Sue Kolupar, point three at 145 an hour." It is broken down very very neatly by the tenths of an hour, your Honor. The bill is the same as the one submitted last November. Wilde considered it at that point and made an offer in the course of the mediation. The bill does not differ in any way.

We did not file a motion last week, your Honor. In fact, all the parties were present in front of you, as you know, on February 25th. We have a transcript from that hearing. You disposed of the motion and then said, "We'll all meet back here on the date set for trial to the court on May 13th and we'll consider the attorneys' fee issue." Everybody nodded their heads in agreement. There was no dissent. There was no objection to it at that point.

THE COURT: Yeah, but there was also no indication by the Court that I waived any of the local rules, or any of the notice requirements.

MR. ERSPAMER: Sure. And the rule that's

EXHIBIT
tabbies
5

cited by Attorney Gutenkunst deals with a motion. Your Honor, we did not file a motion last week. We simply filed a bill. It is not a motion. It is a matter that's already pending before the court. It's not a new matter. It is a matter being considered by the parties and discussed by the parties.

The only thing that changed on it was the line items for a couple things that happened between November and now, and it was submitted to the parties five days ago.

MS. GUTENKUNST: Your Honor, very briefly. We never got the bills. The only bills I ever received were in response to discovery on discovery which were produced July 25, 2001. The bills which I received were duplicitous; one would roll over onto the other. I had not added them up.

THE COURT: Enough, enough. All right. Part of what we go through when we transferred from children's court to criminal court to civil court is we have to run the gauntlet of the Mike Skwierawski -- what do they call that -- judicial training mentoring -- judicial mentoring. We have a big meeting with Mike Skwierawski, who is the chief judge, who is the primary mover of the deadlines of the scheduling orders, the deadlines for mediation; the commitment by the circuit courts to schedule one jury trial and not double stack so there is certainty of trials.

And Skwierawski's point -- and it's been

affirmed by everybody, and everybody agrees, is we have to hold people accountable; hold them to deadlines, hold their feet to the fire, make lawyers do work and do it in a timely fashion. So that is where I am coming from in my decision. I just do as I am told, if I agree with what I am being told. I happen to agree with this.

Now, it's very troubling that there is -- a submission that you submitted, counsel, late is at variance with what you're asking for. It's an extreme amount of ambiguity. And that is the poster child for requiring notice and information provided in a timely manner so that those things can be resolved.

Further, we have a third factor here. We do have a special master appointed by Judge Malmstadt and reaffirmed by me who has in open court given the Court an opinion as to what he thinks should happen as a result of his duties as special master. And his point to me in open court yesterday was the Court should do equity, and that's -- that's Atinsky saying being fair to both sides and treat them equally.

I did, in fact, impose a very substantial sanction. I gave you a default judgment. And what is good for the goose is good for the gander.

And I am further satisfied that time limits and responses and cooperation between counsel in this

matter -- and nobody is sitting here with clean hands -- is substantially deficient.

This was not a smooth discovery. And that's a decision counsel's made, but from my point of view I am going to hold to time limits. These records were submitted late and contrary to local rules, and contrary to the State Statute. And they're ambiguous besides, which is the reason for the rule, and I am rejecting the fee submission by counsel. They were submitted too late and will not be considered by the Court.

Nothing in those transcripts is going to be material to me. I don't need to look at them. That's just going over the horror stories of this discovery process and are not going to be helpful to the Court.

Now, in the absence of that, is there any further testimony? Do you have any testimony? Witnesses?

MR. ATINSKY: I have none.

THE COURT: Any further testimony or witnesses?

MR. ERSPAMER: If you'd give me a moment.

THE COURT: Sure.

MR. ERSPAMER: Your Honor, the issue that is raised by counsel here is one that we don't believe, as you know, defendants are truly surprised by it for the reason that our mediation submissions in November were virtually

identical of these billings.

I don't have my mediation submission with me, I don't think, in it's entirety. I would ask to supplement the record to show that at the time of the mediation Attorney Atinsky and Gutenkunst were provided with -- I don't mean Attorney Atinsky -- but were provided with copies of the bills, which at that point were about $50,000.00, and had ample opportunity to review them and, in fact, negotiate based on the bills.

If the issue is a surprise, we believe consideration of materials submitted at the mediation will show that in fact there wasn't a true surprise in that case.

THE COURT: How can I consider anything at mediation?

MR. ERSPAMER: Well, you don't have to consider anything in the mediation, Judge, but what you can consider is the issue of whether they are truly inconvenienced, or in any way taken advantage of here by a filing --

THE COURT: I have made my ruling.

MR. ERSPAMER: You have. And what I am asking -- I don't want to argue with you, Judge, 'cuz that is kind of counterproductive, but I would ask the opportunity to supplement the record in this case to show the material submitted in mediation to show that in fact --

THE COURT: I don't think I am doubting that you have $53,000.00 worth of time that you allege that you put in. I will give you that. I understand that. I am not doubting it. I am not doubting your truth or veracity. As an officer of the court you told me you put in $53,000.00. That is fine.

MR. ERSPAMER: Actually not all of that is attorney's fees, Judge. There was, I think, about $7,000.00 in costs. I think the attorney's fees were something -- well, they're the remainder after $7,000.00. 45, $46,000.00.

THE COURT: Fine. All right. Testimony's closed. Brief argument.

MR. ERSPAMER: The brief that the defense submitted in this case relies on Aspen, the Wisconsin Court of Appeals decision. Aspen Services, Incorporated versus IT Corporation. It is surprising that while it choose that particular case -- in that case the plaintiff demanded $19,000.00 before suit, and the defendant responded by offering $14,000.00 and some change plus a forfeiture of a $5,000.00 security deposit. That's the factual basis for the case. So plaintiff demanding 19,000, the defendant offering the equivalent of $19,000.00. You think that would be done, correct?

In fact, it wasn't done. And the case is

APPENDIX 9

In this case Attorney Gutenkunst claims, well, we didn't engage in hardball litigation. Well, I don't want to go back over the discovery issues but, your Honor, taking a case like this as far as they did and then taking the position at the last minute we'll pay her basic damages but we'll fight on the attorney's fees that are necessitated by forcing the plaintiff to the eve of trial, that is hardball litigation.

Without a fee-shifting statute that is respected by trial courts, it really takes a remedy away from plaintiffs like Tammy Kolupar. Thank you.

THE COURT: All right. Well, I happen to be a judge that imposed $18,000.00 in attorney's fees on a $500.00 judgment. I thought it pecuniary loss with Roob Photo, who is now in prison. Talked himself into prison on his civil dispute. And I did in fact impose $18,000.00 in attorney's fees on a $500.00 pecuniary loss.

Interesting enough, it was sent back by the Court of Appeals because I didn't impose enough. I had further direction that I didn't take into account the motion after verdict, so -- so I am not particularly persuaded by any relationship between the amount of the judgment and how much the attorney's fees.

There is no formula -- kind of thumbnail or formula that I operate under. The statute -- the state

EXHIBIT

6

legislature clearly intended in a number of different areas for fee-shifting statutes to cover those situations where a little guy can take on the big guy. And this is one of those cases where the fee-shifting statute comes into play and creates obligation on behalf of Wilde Pontiac.

There is no question this case was over-tried. Discovery was over -- well over-done. It was over-plead right from the get-go on the complaint. There was the shotgun pleading where everything was plead against Wilde short of conquering Europe during World War II.

So that was the framework, and the daunting discovery mountain was created right from the get-go. And that was based upon the plaintiff's pleading. A lot of that I think was over-pled, but it only applies as to what are reasonable attorney's fees during the course of a contentious non-cooperative discovery process.

I am satisfied that many of the deadlines that were missed the majority of those were missed by plaintiff's counsel. I think that is what Judge Crivello intimated in his discussions and his recommendation. Again, I go back to Judge Crivello and he said the court should do equity.

I am persuaded that the state legislature wants the little guy to be able to receive benefit of being able to go against the big guys, but at the same time that statute doesn't create a blank check where whatever is spent

must be covered by the wrongdoer.

Now, as to the settlement and whether it came early, whether it came late, I can't draw anything negative to one side or the other because that is the way all of this is set up, and that's why we have mediation and people go through it. And there are economic decisions to be made and evaluations of evidence is presented. And I am not going to draw any negative inference that while the Mawdsley case out of Waukesha provides the framework for the Court to use its discretion, I am not -- I don't see any gross wrongdoer here.

Like Mr. Atinsky said, this matter was over-tried. The long and short of it, it comes down to -- I appreciate Judge Crivello's recommendation. I think it's appropriate. I happen to concur with it.

In my discretion I believe that there is entitlement for reasonable attorney's fees on behalf of the plaintiff. Reasonable attorney's fees in my mind of $15,000.00. I am ordering $15,000.00 fee to plaintiff for attorney's fees and costs that was originally submitted as an offer of judgment.

The flip side is Wilde has to swallow whatever fees they have. I think that establishes what the statute intended by the fee-scheduling statute. There was way too much work done, and there should have been a focus, and much

earlier in the proceedings. And there is nobody here with clean hands, so that's the order of the Court. Joint and several.

MR. ERSPAMER: As to the costs?

THE COURT: Fees and costs, $15,000.00.

MR. ERSPAMER: Well, the offer was $15,000.00 plus costs, I think; was it not, your Honor?

MS. GUTENKUNST: The offer's expired.

MR. ERSPAMER: Okay.

THE COURT: $15,000.00.

(Whereupon the proceedings were concluded.)

APPENDIX 10

STATE OF WISCONSIN

CIRCUIT COURT MILWAUKEE COUNTY BRANCH 39

COPY

TAMMY KOLUPAR,

Plaintiff,

-vs- CASE NO.: 00CV002571

WILDE PONTIAC CADILLAC, INC.,
and RANDALL THOMPSON.
Defendants.

MOTION HEARING

June 27, 2002 HONORABLE THOMAS R. COOPER
Circuit Judge Presiding

APPEARANCES:

PAUL ERSPAMER, Attorney at Law, appeared on behalf of the Plaintiff, Tammy Kolupar.

KATHRYN GUTENKUNST, Attorney at Law, appeared on behalf of the Defendant, Wilde Pontiac Cadillac.

PHILIP ATINSKY, Attorney at Law, appeared on behalf of the Defendant, Randall Thompson.

LORI ZAHN, COURT REPORTER

EXHIBIT

tabbies

7

TRANSCRIPT OF PROCEEDINGS

THE COURT: Motion to reconsider. First, this is in the matter of Tammy Kolupar versus Wilde Pontiac. 00CV002571.

Appearances, please.

MR. ERSPAMER: Good morning. Paul Erspamer, E-R-S-P-A-M-E-R, appears for Tammy Kolupar.

MS. GUTENKUNST: Wilde appears by Attorney Kathryn Gutenkunst, G-U-T-E-N-K-U-N-S-T, and Brian Brejcha, B-R-E-J-C-H-A.

MR. ATINSKY: Philip Atinsky appears on behalf of Randall Thompson.

THE COURT: Mr. Erspamer, you have the motion to reconsider. I reviewed it. Convince me there is new evidence.

MR. ERSPAMER: Well, Your Honor--

THE COURT: Briefly.

MR. ERSPAMER: One of the issues that was raised by the defense during the trial, the timeliness surprise issues as to the bill. I tried to include, Judge--is two indications on that.

First of all, that there was previously a version of that bill sent in August at which point--the previous August--7 months before--eight months before--at which time the balance is $35,000. In fact, that bill was utilized by the parties between the two mediation sessions--at least one. I'm not sure whether one or both. And I was quoted extensively in Wilde's brief

submitted to you before May 13.

THE COURT: I don't think so. I made my decision based on the court trial. I don't think I relied on surprise. Based upon reasonableness of attorney's fees.

MR. ERSPAMER: Also on that issue briefly, Your Honor, you had in chambers before the start of the May 13 bench trial, you offered an adjournment to the parties as a remedy for surprise and particularly to the defense, who's claiming surprise. I see you're nodding. What you told us, that was--that's the best remedy for--for surprise, if that's a legitimate problem, is grant the parties an ajournment and get our acts tcgether and do it another day.

THE COURT: I don't think I had an expectation that you would get your act together.

MR. ERSPAMER: But that offer was made, Your Honor, and it wasn't taken. I think it's a timeliness issue to the extent, that was the motivation.

THE COURT: What I'm saying, counsel, that wasn't very important. Matter of fact, my recollection, I didn't consider that in my decision. It wasn't material in my decision. I remember my decision being based on the fact that this case was overtried. It was too much time spent to accomplish the functions that should have been done, and I wasn't going to authorize a $35,000 request. That was the basis of my decision.

MR. ERSPAMER: The second issue that we wanted to address involved the recommendation of Frank Crivello. You know, a former circuit judge appointed by Judge Malmstadt first, and I think continued perhaps during your--

THE COURT: Yes, he was appointed special master--

MR. ERSPAMER: --discovery--

THE COURT: --issues.

MR. ERSPAMER: Yes. He was not appointed as a global referee or special master. Under 80517, you can appoint the special master to do fact finding. That wasn't his assignment in this case. He actually served for a period between May and August of 2001.

At the conclusion of that, he submitted a bill. That was-- A bill was made and that was the last we heard of him until he showed up on May 13 subpoenaed apparently by Wilde; and frankly, seen conferring with Attorney Gutenkunst at the hearing and with Wilde's intention he be called as a witness on their behalf.

He previously stated that he was done. He considered his assignment in the case finished. That being the case, Your Honor, I think it was unfortunate perhaps, with all due respect, to rely upon the Court to solicit opinions from Mr. Crivello as to the overall--

THE COURT: Okay, I understand.

MR. ERSPAMER: --resolution of the issue. Told us

in chambers before and--he would have difficulty serving as a mediator or arbitrator in the case. He didn't have much overall global knowledge about the facts in the case. He didn't read the depositions. As you know, I think three depositions taken by the defense and nine by the plaintiff. He didn't read them or have much knowledge. He said he would have difficultly serving as mediator or arbitrator.

That being the case and also frankly some of his testimony elicited by the Court on his conclusion even about the discovery issues, that he apparently, you know, that of course, was involved in candidly some of the conclusions he stated.

For example, one point he stated, an order was not drafted by the plaintiff. I think everything that he did was on the record and if you go back to the transcripts of--of the hearings, he acknowledges later there was a mix-up as to who was to draft what. In fact, portions that he claimed the plaintiff was to prepare in the record were things he asked Wilde's attorney to draft.

So conclusions that he had, I think, he stated here in court as to plaintiff, being both parties, a horse a piece, being dilatory, but plaintiffs somewhat more dilatory not supported by what happened in the case and the transcript.

My central point on Crivello is he didn't have a global responsibility regarding the case. He acknowledged he didn't have a global understanding of the facts of case. He

never was given depositions or stated, I reviewed depositions. And frankly, opinions that he apparently articulated regarding the case was overtried, were opinions he didn't have a foundation to offer.

THE COURT: All right.

MS. GUTENKUNST: First of all, I'd like the Court to note my affidavit previously filed in opposition to this had an error as to the date. This morning, I modified those. Mr. Erspamer is aware. I have the affidavit as June 6 and 7 and I--I had been looking at the wrong calendar. Your Honor, those have been modified in pen and ink. The days are-- It's May 9 and 10 the days I received them.

I merely state to you, this morning the Court made it abundantly clear. The date of the motion hearing, you denied the submittal of the billings. They were untimely. I do not recall the Court ever offering an adjournment. I remember suggesting a potential remedy with an adjournment, we didn't wish to persue, due to the untimeliness of and the entire texture of this case.

Relative to my privately conferring with Judge Crivello, Your Honor, I was in this courtroom in the presence of your clerk and all counsel. There was no private conferring. I think we were discussing the remodeling of the courtroom. There was no private conferring.

THE COURT: What, you don't like it?

MS. GUTENKUNST: Judge Crivello was telling us about I think, it's the original lights. There was no improprieties going on.

Finally, Your Honor, I would note to the credibility of Mr. Crivello's opinions, dealt with the vast discovery disputes and vast amount of the discovery; and as I recall, the Court's comment; and I'm sure the transcript reflects those, it was a fact there was a lot of discovery, and Judge Malmstadt had ordered in a previous hearing before he left this court, he would award costs relative to discovery at the conclusion of the case.

Based upon that order of Judge Malmstadt, we felt Mr. Crivello's opinions were not worthy. He handled discovery. We have not heard anything this morning that is new, definitely nothing that would allow this Court to modify the original decision. We ask the Court to deny the motion for reconsideration.

MR. ATINSKY: I have nothing further, Your Honor.

MR. ERSPAMER: One other issue I was getting to before attorney--

THE COURT: I thought you were done.

MR. ERSPAMER: I was not.

I have in front of me a deposition and transcripts of witnesses that were called for deposition by the plaintiff. And I think we offered those at the trial and offer them again

today.

One of the things I heard on conclusions of the proceedings May 14, too many depositions were taken. Case overtried that--

THE COURT: And seem to be affirming that today.

MR. ERSPAMER: Your Honor, no. I don't think so. I am affirming that--

THE COURT: I think so. You are.

MR. ERSPAMER: --the issues as to whether the case was overtried or not, of course, I think you will recall as soon as offer one was made by Wilde, the plaintiff accepted it; but what's more the issue of whether depositions were taken unnecessarily or the case was overtried. I think reference has to be made to the deposition transcripts themselves in order to make that finding. That is why I'm offering them again today as an offer of proof.

I think, if you look, for example, at the deposition of Patrick Donahue Vice-President, executive Vice-President for Wilde, he told you judge that he considered Mr. Thompson a loose cannon, unpredictable, and uncontrollable. In the deposition he offered that Wilde prohibited, would never authorize a salesman or sale manager like Mr. Thompson to sell his own vehicle during the business day.

But Mr. Zanella, Z-A-N-E-L-L-A, who's currently the general manager at Wilde Toyota, he was a direct supervisor of

Mr. Thompson at the time of the transaction said, he knew of no policy Wilde had which would prohibit a salesman or manager from doing what he did, which was selling his own vehicle in the course of the business day at Wilde.

Mr. Braun, B-R-A-U-N, Bradley testified he was the on-site manager. Zanella and Braun were the on-site managers at the time--the dealer at the time. He testified that people did it from time to time. He had done it himself he thought, two or three times, it being selling your own vehicle at the dealership on company time, use the company facilities. Mr. Zanella said using the company fax machines, computer, forms, things like that.

The deposition of Dexter White, department of transportation dealership compliance officer at that time, told us he thought Mr. Thompson was engaged in the age-old practice of curbing cars, which is selling your own vehicle in the guise of a company transaction.

The witness, Jamey Robbins, R-O-B-B-I-N-S, witness who testified as to the severe mechanical problems encountered with the motor vehicle.

The witness, Amy Miller, (phonetic) there was a cumulative witnesses supporting evidence that was presented by direct testimony by the plaintiffs.

THE COURT: That's all just cumulative stuff that--and I, quite frankly, there wasn't one bit of testimony

that you presented that I doubted. Those are all cumulative evidence for facts which I had agreed and considered and agreed with you. And that's just the point on this case. Why do I need all of that, when you had already established that point? I don't need to consider all of that. You proved those elements. That's an example of why this discovery went on far too long. It was unnecessary.

I took Judge Crivello's--first of all, just one factor I considered, and I really was interested in his opinion on the discovery process. I did not take his testimony as a special master or global on what I should do on the case. I wanted to see what his view of it--advice--discovery was, he was a specialty master and this is exactly the kind of stuff that the trial was about. I took two days on this.

MR. ERSPAMER: Right.

MS. GUTENKUNST: Right.

THE COURT: It was a half day trial I took two days on.

MR. ERSPAMER: My point about the deposition was not that you aren't convinced as to the facts at this point, the defense having offered settlement and so forth, the point is all the depositions had to be taken before the defense offered dime one. The defense would not buy. Their sales manager would be construed as an agent. They would have to buy it.

THE COURT: This is rehashing the same stuff. I'm

satisfied there is not additional evidence justifying a motion for reconsideration; and the motion is denied.

MR. ERSPAMER: For purposes of the record though, I would again offer the transcript of the deposition. I think--

THE COURT: I think they're not material. Appeal your case to the Court of Appeals and see if they agree.

MR. ERSPAMER: I understand those rights, Your Honor, I'm asking--

THE COURT: These proceedings are closed.

(Proceedings concluded.)

APPENDIX 11

Exhibit E

STATE OF WISCONSIN
CIRCUIT COURT, BRANCH 39
MILWAUKEE COUNTY

COPY

TAMMY KOLUPAR,

Plaintiff,

-vs-

WILDE PONTIAC CADILLAC INC.,

Defendant.

MOTION HEARING

Case No. 00-CV-002571

HONORABLE MICHAEL G. MALMSTADT
Judge Presiding

APPEARANCES

Attorney Paul M. Erspamer and David Lisko, appearing on behalf of the plaintiff.

Attorney Kathryn S. Gutenkunst, appearing on behalf of the defendant.

Date of Proceedings:
November 27, 2000.

Lisa Kwasigroch
Court Reporter

EXHIBIT 8

THE CLERK: 00-CV-002571. Tammy Kolupar vs. Wilde Pontiac Cadillac et al. Appearances, please.

ATTORNEY ERSPAMER: Good morning, Judge. For the plaintiffs Paul M. Erspamer and David Lisko, L-I-S-K-O.

ATTORNEY GUTENKUNST: Wilde appears by Kathryn Gutenkunst.

THE COURT: This is plaintiff's motion for sanctions?

ATTORNEY ERSPAMER: That's correct, your Honor.

THE COURT: Go ahead.

ATTORNEY ERSPAMER: Thank you. We already had the motion to compel discovery before you, your Honor, which is unusual in my practice, but you heard this on September 25.

THE COURT: Right. I remember.

ATTORNEY ERSPAMER: And you ordered that the parties to do--both sides to do certain things. Thirty days-- Within 30 days after that hearing date you ordered the defendant Wilde to produce documents relating to any purchase or sale of either the '93 Sunbird or the '85 Mercedes. That would have been by October 25, and then no later than 45 days after that date depositions involving the principal parties, the plaintiff Tammy Kolupar and Mr. Vanderveldt, who's the

general manager--

The difficulty here and in what brings us here, your Honor, is that we still don't have the documents that were the first prong of your order. The defendant contends in a written letter, "We cannot produce what we do not have." They contend they have no documents relating to-- We're talking here about the 1994 transaction in which Ms. Kolupar--

THE COURT: Traded in a Sunbird on a Mercedes. You know, I know way too much about this case. I should not know chapter and verse about this case.

I know a young lady traded in her Sunbird for a Mercedes. The Mercedes was owned by the general manager of Wilde. Wilde's claim is that we have nothing to do with it. He did a private selling of his own car. He moved somewhere down south. He had a process server-- You served him?

ATTORNEY ERSPAMER: That's correct.

THE COURT: Yeah, I know.

ATTORNEY ERSPAMER: You got the picture, your Honor. The difficulty here is it's a little difficult to go ahead with the case when we can't get the basic documents related to the transaction in this case.

THE COURT: What if they don't have them?

ATTORNEY ERSPAMER: The position that the

defense has taken throughout is that as you just stated.

THE COURT: The last time they were-- There was truckloads of boxes, and they were going through them to get their documents, and it was taking a long time, but they were looking for them.

ATTORNEY ERSPAMER: Their formal response in their written response was that they objected to producing the documents before securing plaintiff's deposition based on a remark attributed to me that the documents were necessary to prepare plaintiff for her deposition.

THE COURT: And I said you have to produce them.

ATTORNEY ERSPAMER: You did. That's exactly what you said. They haven't been produced.

THE COURT: Now they're saying they don't have them. That's a different--

ATTORNEY ERSPAMER: That's exactly what they're saying. "We cannot produce what we do not have," and, "Please be advised: No sale, no documents."

THE COURT: Okay. So?

ATTORNEY ERSPAMER: Your Honor, if this young lady brought in a '93 Sunbird and they purchased it from her either as part of a trade-in or she just came in off the street and sold them the vehicle, they would

have a copy of her title--of their application to get a duplicate title. So they would have a title, so they would have a copy of information from-- They would have copies of any checks involved in the transaction, if she actually sold them a motor vehicle presumably.

They would have documents relating to the supplemental sale to a consumer or maybe a transfer to--to another dealership. It's not plausible that she brought in a '93 Sunbird, sold it to them, and they have no documents at all.

THE COURT: Make your pitch to him.

If Wilde wanted to take the position that they purchased a car from this young lady, paid her a check for them, took title to the car, transferred it to their name, sold the car to somebody else but they have no record whatsoever of doing that, they can get up here and do that, and a jury is going to say, "What the hell kind of outfit is that?" I would assume, because you can argue to them what the hell kind of outfit is this, a big-time auto dealer and they have no record of their transaction.

ATTORNEY ERSPAMER: Counsel has no documents relating--

ATTORNEY GUTENKUNST: Judge, if I can approach the bench.

First of all, Judge, this is ridiculous that we're here. I have produced every document. I've taken the position since the get-go. We did not sell the Mercedes.

Waukesha State Bank has produced a check made payable to Mr. Thompson. He has told me on the phone he did not-- Excuse me. He sold the Mercedes.

What I find interesting is if she brought this car from my client, where are her documents? I've--

THE COURT: We're not talking about the Mercedes right now. We're talking about the Sunbird.

ATTORNEY GUTENKUNST: Judge, if we-- Every file we have I produced, and as I stated, I've turned over copies of the Mercedes sale. We turned over Mr. Thompson's personnel and the purchase of the Sunbird. We did not sell the Mercedes. We can find no report.

I did-- I ran a title report on the Mercedes. I failed to run a title search on the Sunbird. If Mr. Erspamer did his homework, your Honor, he would know or he could find out and impeach my client that we should have these documents, but we can't give him what we don't have, Judge. We-- He can then request admissions to Mr. Thompson that his car--

THE COURT: The Mercedes was his car?

ATTORNEY GUTENKUNST: That's correct. And so I've sent Mr. Erspamer-- I attached a copy of my affidavit--I think five or six letters saying I don't have them. Lets get a-- Depositions we're to be completed by the 9th of November. I'd like to know the circumstances of the purchase, perhaps if I could talk to the young lady in a deposition, I could find out who she spoke to and track down--

THE COURT: Has anyone done a title search on the Sunbird?

ATTORNEY ERSPAMER: What we have on the Sunbird-- She produced some documents relating to the young lady, the original purchase of the Sunbird.

THE COURT: All right.

ATTORNEY ERSPAMER: If I can approach.

THE COURT: My arms--

ATTORNEY ERSPAMER: What you got there, your Honor, was buried in a stack of documents that they did produce. These are documents from 1994, April of 1994, where they're doing the safety information. They're doing the cleanup. They sent the car to have some paint done on some vehicle damage.

The second page of those documents-- It's dated April 14 of '94--is a repair order. It just shows how much they paid for each of those items. You can see

they paid apparently 14 hundred and some dollars to clean up the Sunbird after they acquired it from Ms. Kolupar, the plaintiff here.

THE COURT: I'm sorry. This is what they paid to have it fixed after they got it from her?

ATTORNEY ERSPAMER: Correct. Internally those are the expenses that they incurred in order to make it presentable to sell to somebody else.

THE COURT: All right. Let me-- Do you agree that's what these documents are?

ATTORNEY GUTENKUNST: Your Honor, the repairs were made payable to Wilde, but I could find no purchase documents.

THE COURT: So you can find no documents--Wilde can find no document which says they purchased the car from her?

ATTORNEY GUTENKUNST: Right. But we did find this, and I produced it.

THE COURT: Okay. So the next step I would think is to talk with the State of Wisconsin and do a title search on the car. The car-- Was it purchased new from Wilde?

ATTORNEY ERSPAMER: It was purchased new from Wilde.

THE COURT: So the original title is a Wisconsin

title?

ATTORNEY ERSPAMER: Your Honor, the document you have in front of you shows that they acquired the vehicle from her and cleaned it up preparing for resale.

THE COURT: Okay.

ATTORNEY ERSPAMER: They've--

THE COURT: And assume they acknowledged they purchased it from her.

ATTORNEY GUTENKUNST: Judge, my client, Mr. Vanderveldt, can't acknowledge he wasn't there. It would appear that Wilde had worked-- He didn't know if they took title to it. We don't know.

ATTORNEY ERSPAMER: One other point--

THE COURT: Wait a minute. Does a dealer when they take a deal in trade, I don't know, do they have to take title to it?

ATTORNEY GUTENKUNST: No, they don't. We take the title, hold it, then when it gets sold, it gets transferred to the new buyer. So the title realistically would not appear under the name Wilde.

THE COURT: But somewhere Wilde-- When Wilde takes a vehicle in trade, there should be some documentation they took the vehicle from trade?

ATTORNEY GUTENKUNST: Yes, Judge. There's an--

THE COURT: Okay.

ATTORNEY ERSPAMER: Relating to the Mercedes they maintain that they have no document showing that there was any transaction involving the Mercedes or any trade-in. That's been your position.

THE COURT: My understanding of their position has been consistently that the Mercedes was Mr. Thompson's vehicle, and Mr. Thompson engineered a private sale--sale of his Mercedes.

ATTORNEY ERSPAMER: Right.

THE COURT: So Ms.-- However you--

ATTORNEY ERSPAMER: Kolupar.

What the defendant did in this case was she set up a deposition for a bank employee on August 3, and Ms. Gutenkunst sent that packet of documents to the bank employee before her deposition.

ATTORNEY GUTENKUNST: Your Honor, just so the Court is aware our firm represents Waukesha State Bank. We foreclosed on the note of this vehicle, and we ran the conflicts check and this young lady's-- We foreclosed on behalf of the bank on the note for that Mercedes and again Ms. Kolupar, so when I noticed the deposition of the bank, they indicated to me that they no longer could find their file. So I sent them copies of--out of our files, which I think they were filed in

the Waukesha County Circuit Court. I did not, however, have a copy of the cashiers check which Waukesha State Bank issued to Mr. Thompson, but anyone can go into a foreclosure file and find that information.

ATTORNEY ERSPAMER: If you look, there's a document that says GMAC.

THE COURT: Yep.

ATTORNEY ERSPAMER: This is a document-- If you scan down halfway down the page, it identifies Ms. Kolupar as purchasing a used 1985 Mercedes, just about halfway done the page.

THE COURT: Trading a 1992 Pontiac.

ATTORNEY ERSPAMER: Exactly. And over on the right it shows a cash price of the transaction. Then it shows apparently a $200 net trade allowance due to her.

Your Honor, this is a document that defense counsel used to prepare the bank--apparently sent this to the bank employee to prepare--for her to prepare for her deposition, which I happened to get a copy of it when an associate handled the deposition. This is not disclosed to us as part of our document request. She used this to prepare the bank employee for deposition, but she maintains consistently there's no transaction, no sale, no documents.

The fact is, your Honor, what we have here are some documents which are slipped through. She apparently accidentally put in the 1994 documents relating to reconditioning the Sunbird even though her letter says there was no sale, and now we have this document.

THE COURT: I'm sorry. When you say accidentally put in, these documents were turned over to you?

ATTORNEY ERSPAMER: Those documents are turned over--

THE COURT: Documents about the reconditioning of the vehicle?

ATTORNEY ERSPAMER: They were told to turn over to me with a letter saying there was no sale in '94, but what was given to me--the '93 documents with '94 that were added.

My understanding is that they didn't say there was this sale. She says there is no record of a sale, at least that's what I'm hearing today.

Her letter to me says something very different.

ATTORNEY GUTENKUNST: Judge, to make a long story short, I took my client's docket, copied and sent it in. I didn't send anything-- I sent everything just as the Court ordered. I don't pick and choose my documents. I gave other counsel--opposite counsel in

accordance with the rules of discovery all of the documents. It wasn't inadvertent.

THE COURT: Okay. And the November 17 letter read, "I'm in receipt of your letter of November 17. Please be advised: No sale, no documents."

ATTORNEY GUTENKUNST: Correct.

THE COURT: No comprehending. I don't know if that means the Mercedes or the Sunbird or both.

ATTORNEY GUTENKUNST: The Mercedes, your Honor-- That was before.

THE COURT: I don't know.

ATTORNEY GUTENKUNST: That was referring to the Mercedes, Judge. I already sent four of the letters saying we don't--

I'm frustrated. His client should have something to show. Let me take her deposition. I'll-- My client has produced every document it has. The only one who was there at the time were two people, Ms. Kolupar and Mr. Thompson, depositions we can't get to.

ATTORNEY ERSPAMER: I'm not confident they produced every document that they have.

THE COURT: I'm confident they've not produced anything in court that hasn't been produced up till now.

If you come up with other--other documents, you can

produce them, and you can do what you will with them, but I'm not going to permit them to produce any documents that indicate--that have not already been produced.

They're saying there are no other documents. Fine.

ATTORNEY GUTENKUNST: Judge, the only cautionary thing-- Until I talk to Ms. Kolupar, she can tell me who she talked to, if that person is still employed by the dealership.

THE COURT: She talked to Mr. Thompson?

ATTORNEY GUTENKUNST: Apparently she must have talked to somebody else. I-- She wouldn't talk with Mr. Thompson, but then again I don't know because I can't talk to her.

THE COURT: Well, I'll tell you what. Perhaps maybe somebody at Wilde Pontiac better take a look at this--this GMAC financial service document. Customer-- Is that Tammy's printing?

ATTORNEY ERSPAMER: No, the bank employee said this was--

ATTORNEY GUTENKUNST: Bank employee-- She didn't know.

THE COURT: But we know banks don't prepare them. Generally these are prepared at the dealership.

ATTORNEY GUTENKUNST: That's correct, your

Honor.

For all they know Mr. Thompson prepared them. Then we haven't taken his deposition.

THE COURT: But you have access to Mr. Thompson. You can show this?

ATTORNEY GUTENKUNST: Actually I don't. Mr. Atinsky represents him, and he lives in South Carolina. I've scheduled a testimony deposition. I believe it's scheduled for next week.

THE COURT: Okay.

The bottom line is, you know, if an attorney stands in front of me and says, "Judge, I can't find any documents," fine. There's a peril to this. They-- They turn up, somebody's butt is going to be hung out to dry, plain and simple.

I mean that's-- You can say sanctions, fine. I'm not going to look an attorney in the face and say I don't believe you, but I'm not going to take a lawyer who says we can't find any documents other than what we've already turned over-- I'm not going to say to that lawyer I don't believe you. I'm sanctioning you.

However, if at some later date those documents do turn up, well, then it's going to be a whole different story. I mean, it's either going to be a default judgment against Wilde for hiding them or sole action

against the attorney for not turning them over, plain and simple. I don't know what else--what other way to do it.

Right now if the documents haven't been produced, you-- I'm baring from using any documents that have not already been turned over. I don't know what else to do. They're saying they made a diligent search and can't find them. Fine. Then we take them at their word until that's shown to be non-reliable and there's nothing in front me that says that.

I have a little problem with the fact that this bank statement, this GMAC, went to the bank and didn't go to Mr. Erspamer.

ATTORNEY GUTENKUNST: Judge, that was before. Just so the Court is aware we were in receipt of Waukesha State Bank-- We foreclosed on this car. When I subpoenaed the bank representative Sandy Anderson-- When I called the office and said, "I can't find my file. Do you have your foreclosure file still?" And I asked her to send her copies, and that was produced at her deposition. It wasn't inadvertent. It was part of her file. It was given to Mr. Erspamer at her deposition.

Mr. Erspamer would like to paint myself, my firm, as being sneaky. We haven't been. We put it on the

table.

What I find interesting is if my client is lying, why doesn't she give us a copy of her document and show me that I'm wrong? I'm more than happy to look again, but I can't produce what I can't find, and I can't get her deposition.

I sent a letter right after I left this courtroom, and Mr. Erspamer just ignores me.

THE COURT: Quite frankly I have a hard time believing that they don't--in a system where, heck, they can get--get hands on a document that they create--

ATTORNEY GUTENKUNST: Car dealership are very-- Their deal files are this thick, and they have more paperwork than we deal with in a courtroom. It's bad, especially 1994, it was worse.

THE COURT: A truckload for 1994-- You know, I don't know, but there's-- It wouldn't take a rocket scientist how to tell how to keep files.

ATTORNEY GUTENKUNST: Judge, we did find three of them, and we gave them to Mr. Erspamer--the Sunbird, the purchase of the Mercedes by Mr. Thompson, and Mr. Thompson's personnel file.

THE COURT: The original sale of the Sunbird--the new sale?

ATTORNEY GUTENKUNST: Correct. And the original sale of the Mercedes to Mr. Thompson--the purchase from the dealership that was turned over.

THE COURT: When did the--did he purchase the Mercedes, the Mercedes approximately in relationship to her trading in the--in the Sunbird on the Mercedes?

ATTORNEY GUTENKUNST: Judge, I left that file in my car.

THE COURT: Okay.

ATTORNEY GUTENKUNST: Mr. --

THE COURT: It certainly-- I think it is quite unbelievable that this-- This GMAC document indicates she traded in the Sunbird on a Mercedes.

ATTORNEY GUTENKUNST: Judge, the bank-- Mr. Thompson knew Ms. Kolupar, and Ms. Kolupar had a personal friend at the bank. He was trying to help her out. This was one of these three-way friendship deals.

THE COURT: That may well be true, but generally one of the finance people at the dealership takes care of the financial arrangements.

ATTORNEY GUTENKUNST: Correct.

THE COURT: Which involves-- Now we have the general manager of the dealership and a finance person at the dealership both being involved with the transaction where she trades in a Sunbird on a

Mercedes.

ATTORNEY GUTENKUNST: Judge, Mr. Thompson wasn't the general manager. He was a sales manager.

ATTORNEY ERSPAMER: A sales manager, he was the new-car sales manager.

ATTORNEY GUTENKUNST: The general manager is no longer there.

THE COURT: Well--

ATTORNEY GUTENKUNST: The general manager is gone, but Mr. Thompson left shortly thereafter.

THE COURT: Right.

ATTORNEY ERSPAMER: The GMAC document was never disclosed to me as part of the document request, your Honor. I asked for a copy of that because I found it in the lady's file when we took her deposition, and it was then marked in the deposition, photocopied. It was never given to me in compliance with any kind of discovery request.

And the second thing, Mr. Thompson apparently bought the Mercedes from the dealer. She can produce those documents. Ms. Kolupar bought the Pontiac Sunbird the year before they got all those documents. We just can't find anything from the '94 other than what's, you know, what's allegedly been the documents that were given to prepare the bank lady and a couple documents.

THE COURT: That and the fact that most people trust car dealers as much as they trust Florida ballot counters. It is going to play well for you in front of the jury, you know.

You know, the fact that they can't find these records is going to smell to high heaven. It is. I can't help it.

ATTORNEY GUTENKUNST: Except for the fact that Mr. Thompson acknowledged that he sold the car personally.

ATTORNEY ERSPAMER: Well, of course, he's a defendant.

THE COURT: That's wonderful. I'm just saying to a common-sense lay juror sitting here and they're told, you know, this-- How old is this woman?

ATTORNEY ERSPAMER: She was 18.

THE COURT: I mean, this is going to an 18-year old young woman, and I hate to sound sexist, but I got a 22-year old daughter. I got a 25-year old son. I got a 20-year old son. They're all bright, bright people. One's working on a Ph.D.. One is in medical school, and the other one is trying to find his way in life and is doing a pretty decent job.

My daughter-- If I talked to her about anything about a car, most young women-- This is going to sound

sexist, I can't help it--don't have a big interest in automobiles. Most. Some do, but most don't, and jurors know that.

So we got a 18-year old woman, and she buys a little Sunbird brand new. I hate-- I would hate to--to take a look at this deal and see what she paid for it.

ATTORNEY GUTENKUNST: The Sunbird or Mercedes?

THE COURT: Sunbird.

You know, she paid the lister for that car and that becomes part-- Good Lord, any hour a year later she trades it in on a car that's owned by the new-car manager and that turns out to be just a piece of junk, that's the plaintiff's case.

And then it's disclosed that Wilde, the dealership involved, has all their records on the new-car sale on the Sunbird, all the records on selling the Mercedes to the new-car manager after they took the Mercedes in trade, but absolutely nothing about the trade-in on the Sunbird on the Mercedes, other than a little financing document that got disclosed, not under discovery demand, but when the law firm representing the--both the bank and the dealership sent a file over to the bank where they foreclosed on the Mercedes, I don't know, Mr. Erspamer. I don't know if you can ask for much more. How much more baggage do you want to be

able to throw at them?

ATTORNEY ERSPAMER: Your Honor, I guess what I'll do is prepare an order based on your ruling today.

One other issue has come up. I received a letter last week from Mr. Atinsky to a copy going-- The original letter was going to Attorney Gutenkunst saying that they scheduled a deposition for Mr. Thompson for Thursday the 30th. I'm already in this court for a trial on the--not this branch but in Milwaukee County--down for a trial on the 30th.

I've asked for the accomodation of including me in the schedule of that deposition since it's important Attorney Gutenkunst that they would not move the deposition slowly-- I guess I have to raise it now. I would ask--

THE COURT: Why not?

ATTORNEY GUTENKUNST: Judge, I've tried to get these depositions in since June. I rescheduled it once. Mr. Lisko is here today. I don't know why. I like to get this case moving forward. I still can't get a date for the plaintiff's deposition.

THE COURT: We're going to give that right--

ATTORNEY GUTENKUNST: I would appreciate that.

THE COURT: We're going to get a new date for Mr. Thompson.

ATTORNEY GUTENKUNST: I have a difficult time getting that, and he has to do it over the phone. We had to reschedule it once.

THE COURT: If it's not rescheduled today, I'm appointing former Judge Frank Crivello to be this Court's referee with respect to scheduling, and depositions, and discovery, at his normal rate that he charges for doing mediations, and the parties can pay for it.

ATTORNEY GUTENKUNST: Could we get a date.

THE COURT: Ultimately I will order that the prevailing party's share of that be paid for by the losing party. This is nonsense.

ATTORNEY GUTENKUNST: Judge, could we have a date set for Ms. Kolupar, a date for completing has passed November 9.

THE COURT: Yeah, let's get a date certain for her deposition.

Mr. Thompson's deposition is going to be taken before her.

ATTORNEY GUTENKUNST: Why is that?

THE COURT: Because it was scheduled for this Thursday, and you don't have a schedule for her.

ATTORNEY GUTENKUNST: Well, I did. I got a letter from Mr. Erspamer cancelling that.

ATTORNEY ERSPAMER: She scheduled it with the other lawyer and didn't include me in the scheduling, otherwise I would have told her.

THE COURT: You're talking about Mr. Thompson. She's talking about Mr. Erspamer.

Quite frankly, you know, I read-- Anybody see the article in the paper? I thought to myself, I'm not having this problem, and I--honest to God a couple of times in three years but nothing like I'm reading in the paper, and all of a sudden--

ATTORNEY ERSPAMER: I have a lot of cases in this court, your Honor. I'm in here a lot.

ATTORNEY GUTENKUNST: Judge, I don't want you to think I've been disruptive.

THE COURT: What I think has happened here is you know in the movie Cool-hand Luke the warden only shots one prisoner and that was one that what he had was a failure to communicate with, so he killed the SOB.

You know, what we got here is apparently a failure to communicate, and I'm putting in charge of it another communicator because I don't want to go through this again. This is foolishness I think.

ATTORNEY GUTENKUNST: All I know is since September 26 through November 17 I sent not less than

five documents indicating I was available, in fact, I think it was November 9th I sent a letter saying I would rearrange my entire calendar to get this young lady's deposition--

THE COURT: When are we going to do her deposition?

ATTORNEY GUTENKUNST: Give me a date. I'll move my calendar.

ATTORNEY ERSPAMER: I would like to take the general manager at approximately the same time she's--

ATTORNEY GUTENKUNST: My letter-- I'm sorry, Judge. I'm so frustrated. All my letters--

THE COURT: Mr. Erspamer, I want a date for--for this young lady's deposition. I don't want to hear diddly about what else you want to depose. I want a date for the young lady.

ATTORNEY ERSPAMER: I will give several dates.

THE COURT: Just one, and that's one we're sticking with.

ATTORNEY ERSPAMER: You also ordered--

THE COURT: I want a date for the young lady's deposition.

ATTORNEY ERSPAMER: Tuesday the 12th, plaintiff.

THE COURT: Of December?

ATTORNEY ERSPAMER: Right.

THE COURT: What time?

ATTORNEY ERSPAMER: 2:00.

THE COURT: Your office?

ATTORNEY ERSPAMER: Sure.

THE COURT: Okay.

Now, you said the general manager. Who's that?

ATTORNEY GUTENKUNST: Mr. Jim Vanderveldt. He's in Waukesha at Wilde Pontiac on Moreland Road.

THE COURT: Who knows their current--

ATTORNEY GUTENKUNST: Yes.

THE COURT: Fine. Let's pick a date for him.

ATTORNEY GUTENKUNST: Judge, I can pick a date for him, but he doesn't work on Thursdays, so he travels from the dealerships.

THE COURT: Where does he travel?

ATTORNEY GUTENKUNST: He goes to Pontiac meetings, Volvo meetings, Isuzu, so I can call him as soon as I walk--

THE COURT: Do you have a cell phone?

ATTORNEY GUTENKUNST: Right here. Yes.

THE COURT: Get him on the line.

(Discussion off the record.)

9:30 on the 12th for Mr. Vanderveldt.

Now, we need one for Mr. Thompson, and that has to be arranged with Mr. Atinsky.

If that's not accomplished by 5:00 this afternoon, contact Mr. Crivello. He will supervise any and other discovery problems in this case.

ATTORNEY ERSPAMER: We ask that Vanderveldt contact at the dealership if there's documents or materials to this--

ATTORNEY GUTENKUNST: I offered that before, happy to do it again.

THE COURT: That's fine. Anything else?

ATTORNEY ERSPAMER: Not at this moment.

THE COURT: The motions for sanction of each party are denied at this point. I'll reconsider those motions at the end of the trial.

ATTORNEY ERSPAMER: Thank you.

ATTORNEY GUTENKUNST: Thank you.

(Whereupon the proceedings were concluded.)

STATE OF WISCONSIN)
) ss.
COUNTY OF MILWAUKEE)

I, Lisa Kwasigroch, certify that I am a court reporter assigned to the Circuit Court, Branch 39; that the foregoing pages have been carefully compared by me with my stenographic notes; that the same is a true and correct transcript of all such proceedings taken on the 27th day of November, 2000.

Dated this 2nd day of February, 2001.

Court Reporter

Lisa Kwasigroch
Court Reporter

APPENDIX 12

gentleman who was a salesperson.

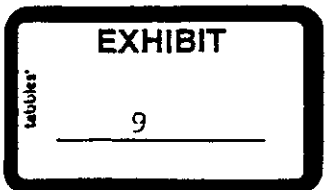
THE COURT: Okay.

MR. ERSPAMER: Actually, she testified in her deposition, Your Honor, and in her affidavit the only person she remembers dealing with at the time of the Sunbird purchase is Mr. Thompson. He's the only person she spoke with. That's a disputed fact, Your Honor. Her mother also said the same thing. The only person they spoke to was the person who approached them on the lot--

THE COURT: I hate to -- I would -- anybody care to take any bets whether if he was the sales manager at that point? Who knows. I'm not going to get into it. I know that in some places sales manager don't get commissions. Salespersons do. And what happens is sometimes when a sales manager sells a car, since he can't get a commission, he finds a salesperson to put his name on the dotted line so the salesperson gets the commission. And the salesperson kicks back some or all of the sales commission to the sales manager, probably much to the dismay of the person who owned the dealership if they found out directly that that was going on. But anyhow, be that as it may.

MR. ERSPAMER: She was asked in her deposition did she speak with anyone else other than Thompson. "Not that I remember."

THE COURT: All right. So there is at least



no dispute that Thompson was somehow involved in the purchase of the Sunbird or -- it's at least a disputed fact.

MS. GUTENKUNST: Mr. Kamoski received a commission. It's our belief and understanding that Mr. Kamoski--

THE COURT: So it's a disputed fact.

MS. GUTENKUNST: Unfortunately perhaps it is, Your Honor.

THE COURT: And for the purposes of this motion, once you acknowledge disputed facts, the -- that element that we talk about -- any element for which there's a disputed fact has been proven for the purpose of this motion.

MS. GUTENKUNST: But, Judge, I think you need to bear in mind that deals with the purchase of the Sunbird.

THE COURT: No. No. I'm understanding that.

MS. GUTENKUNST: Just for the record, Your Honor, Wilde made $88.85 in the sale of this Sunbird to Ms. Kolupar.

THE COURT: According to one method of bookkeeping.

MS. GUTENKUNST: Well, we had the actual--

THE COURT: Yeah, I know. But sometime months later Wilde gets--

MS. GUTENKUNST: Bought it again.

THE COURT: No. No. Wait. Let me finish.

MS. GUTENKUNST: Okay.

THE COURT: Sometime later dealerships get -- I don't know what they call them -- they're--

MS. GUTENKUNST: Rebates.

THE COURT: Yeah. They're things to fudge their numbers. Basically so they can tell the customer we're only making 88 bucks on this thing. Of course six months from now this car will be part of a sales program and we will get some kind of bonus, rebate, whatever, from the manufacturer. I mean, if anybody -- that should be the requirement to get an MBA. Figuring out how car dealerships -- their relationship with manufacturers. Once you figure that out, you -- that should be it. You should get the degree or a CPA, maybe both. I don't know. But it's a nightmare to figure out.

MS. GUTENKUNST: Mr. Erspamer asked Mr. Vanderveldt -- asked a question similar to that in his deposition. Based on the file he understood that they made $88 and change, but Your Honor, you're right. There might be some creative math after the fact that I don't know about.

THE COURT: Well, yeah. Okay. But even if they made a penny, it's still a benefit to Wilde, so it's something that -- all right.

MS. GUTENKUNST: That's why they're in the business, Your Honor. To make money and sell cars.

THE COURT: Right. And that's why they don't want this lawsuit to continue. They'd like it to end because it certainly isn't going to do them any good.

MR. ERSPAMER: Your Honor, one of the issues here is whether Wilde had any reason to appreciate what this man -- it was a single transaction. They did buy the Sunbird that day with approval from the used car manager, but he did sell the Mercedes and he sold it using their bank and using their forms and using their fax machine and using their lot and using their showroom. And she did meet with him at the showroom, by the way, and she was given those documents that you were shown this morning.

And what we found out -- we talked to a man, Zanella, Z-A-N-E-L-L-A, excerpts from his deposition transcript you have there, attached to my supplemental affidavit. Mr. Donague picked Mr. Zanella to come into Wilde, this dealership a few months before this transaction, by the way. Zanella is not some disgruntled ex-employee. He's now in West Allis. He's the general manager of Wilde Toyota. We asked Zanella if Wilde had a policy back in '94 regarding employees selling their personal vehicles on company time at the company location. He told us he couldn't remember any such policy. That's what he told us on Page 106 of his deposition. We then asked if Wilde prohibited its managerial people and its sales people from misrepresenting

that a sale of a personal vehicle was somehow a dealership trade-in. Did Wilde have any kind of a policy or discourage that. He couldn't recall. We asked him if there was any reason that employees like Thompson were forbidden from using a computer to generate dealership documents like the F&I deal worksheet that you have there and like the GMAC financing document to facilitate the sale of personal vehicles. Again, on Page 107 of his deposition, he just couldn't remember whether the dealership had any policy on them using the dealership computer to facilitate a sale of their personal vehicle or not. He was asked if there's now a policy at Wilde prohibiting employees from using the company computer to generate F&I deal worksheets for their own personal transactions. His answer to that on Page 108 is he didn't recall. This is a guy, by the way, who ultimately fired Mr. Thompson and -- but let me continue. He was then asked--

THE COURT: Go ahead. I'm going to cut this short. I don't know what a jury is going to make of all this.

MS. GUTENKUNST: It's a court trial, Judge. Just so you know.

THE COURT: I don't know what some other judge is going to make of all this because it's not going to be me. But if those are the requirements for apparent authority and everybody agrees that they are, there are at least in

dispute, in my view, sufficient facts to show acts by Mr. Thompson justifying belief by Ms. Kolupar in his authority to make this deal.

We have Ms. Kolupar bringing her Sunbird that she bought from Wilde a year before into Wilde, dropping it off, having the sale -- excuse me -- the used car manager do an appraisal of it to see how much it's worth. The dealership runs numbers to determine what a payoff figure is. They give her a trade-in figure on this Mercedes and they fax to the bank and they generate a document that's the F&I deal worksheet which assigns this a deal number, 19473, a deal date, it talks about price, trades, those kinds of things. They generate a customer statement, GMAC financial statement, which shows a trade-in price for their Sunbird -- for the Sunbird on this Mercedes.

I think that's sufficient to create an issue of fact on the question of knowledge -- Wilde's knowledge. You also have some guy driving the Mercedes up to the front of the dealership. She drops off her car, they take her out in back and out comes the other car. I think that's sufficient to create an issue of fact. And I also think given all these facts that we've talked about that there's an issue of fact as to whether or not Ms. Kolupar placed reliance upon those representations consistent with ordinary care and prudence.

If you were having a jury I'd suggest that you have people who are all over the age of 40 because once you reach the age of 40, you don't trust anything that somebody who works in a car dealership tells you. Now this is said by someone whose brother sells cars, and I buy them all from him and I pray to God every night he never leaves that job because I don't want to have to deal with it. But the fact of the matter is the purchase of a vehicle can be a fairly complex mess for someone who doesn't do it routinely. And I think there's enough here to go to trial.

You know, certainly there are things that Wilde can point to that say, well, no, she knew she was buying this car from Thompson. That's going to be an issue of fact. But I think this is a case that goes to trial and does not get resolved at summary judgment, at least on this issue.

So with respect to this motion for summary judgment, I'm denying it. Okay?

MS. GUTENKUNST: Thank you, Your Honor. I'll prepare an Order consistent with that.

THE COURT: Thank you.

MS. GUTENKUNST: Would you like me to submit that under the five-day rule?

THE COURT: Please.

MR. ERSPAMER: Your Honor, I'm relying on

APPENDIX 13

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

TAMMY KOLUPAR,

Plaintiff,

vs.

Case No. 00-CV-2571
Case Code: 30703

WILDE PONTIAC, CADILLAC, INC.
and RANDALL THOMPSON,

Defendants.

PLAINTIFF'S FACTUAL SUMMARY IN SUPPORT OF PETITION
FOR PAYMENT OF ATTORNEY'S FEES AND LITIGATION EXPENSES

On March 30, 1994, Tammy Kolupar, then 18-years old, entered into a purchase/trade-in used motor vehicle transaction at the Wilde Pontiac, Cadillac, Inc. location in Waukesha, Wisconsin. She dealt with Pontiac New Car Manager, Randall Thompson. Tammy Kolupar had bought a 1993 Pontiac Sunbird from Wilde upon her high school graduation, about nine months earlier, dealing with Mr. Thompson in making that purchase.

Mr. Thompson told her Wilde had just received a Mercedes on the lot and would accept Ms. Kolupar's 1993 Pontiac Sunbird in trade should she wish to purchase the Mercedes. (See Tammy Kolupar deposition, p. 35; see, also, Susan Kolupar deposition, p. 36). Mr. Thompson arranged for financing for Ms. Kolupar at Waukesha State Bank, Wilde's bank and a usual direct financing source. Mr.

Thompson used that Bank because he knew it would finance 100% of the purchase price, and without a co-signer. Mr. Thompson gave Ms. Kolupar a deal worksheet prepared on Wilde's computer (Exhibit "3") showing a credit to Ms. Kolupar based on the value of her trade-in vehicle. A GMAC financing application (Exhibit "4") prepared by Mr. Thompson from forms provided by Wilde for Ms. Kolupar's signature and sent by him to Waukesha State Bank on Wilde's facsimile machine also reflected that the loan was sought for purchase of a 1985 Mercedes, and that a 1992 Pontiac was offered in trade for the Mercedes.

Ultimately, these documents proved to be untrue and misleading. The transaction couldn't truthfully be described as a trade-in because (although Wilde accepted Ms. Kolupar's Sunbird from her and sold it at a profit) the 1985 Mercedes she drove away in was owned not by Wilde, but by Mr. Thompson, the Pontiac Sales Manager, personally.

Mr. Thompson utilized his position at Wilde, and the trappings of authority given him by Wilde, to unload a high-mileage car with mechanical problems he had bought from Wilde the previous fall for $5,750.00 on Ms. Kolupar for $8,600.00. Mr. Thompson persuaded Wilde's used car manager to assist in the charade by acquiring the Pontiac, which was re-sold at a profit. To accomplish this, Mr. Thompson took advantage of a unusually loose management philosophy at Wilde which allowed employees remarkable latitude in transacting personal sales of motor

vehicles during the business day at Wilde, using Wilde's resources. (See Zanella deposition, pp. 117-118, in which he testified that he did not think Wilde would terminate a salesperson even if he sold vehicles on behalf of another dealer during the workday at Wilde). Mr. Zanella, (Randall Thompson's immediate supervisor at the time of this transaction) testified he could not remember any policy at Wilde which prohibited sales personnel from utilizing Wilde facilities or the Wilde location to sell personally-owned cars while on duty at Wilde (See Zanella deposition, p. 106).

Ms. Kolupar soon found the Mercedes had severe mechanical difficulties, including chronically malfunctioning brakes and the inability to start the vehicle, or to prevent it from stalling. (See Kolupar deposition, p. 53). She learned that the odometer on the Mercedes had been disconnected or had operated intermittently apparently for some time, resulting in a fraudulent representation as to the number of miles the vehicle had been driven. (See Kolupar deposition, p. 118). She also learned the Mercedes had a bent axle (See Berndt repair document, Exhibit "16").

Wilde's attorneys now argue that Wilde cannot be held responsible for the promises, assurances, statements and representations made by Randall Thompson, its Pontiac New Car Sales Manager, because Mr. Thompson was acting outside the scope of his employment, and Mr. Thompson lacked authority (real or apparent) to bind Wilde.

However, the documents prepared by Mr. Thompson on Wilde's forms and on its

computer and given to Ms. Kolupar clearly indicated that this was a trade-in transaction. As in any trade-in, Ms. Kolupar sold a vehicle (her Pontiac Sunbird) to Wilde and received another (the 1985 Mercedes) in return.

It is unquestionable that Mr. Thompson had the authority to deal with a customer seeking to sell the used car to Wilde. In this regard, Mr. Thompson acknowledged in his deposition that he simply followed the accepted procedure and referred the Sunbird to the used car manager at Wilde (See Mr. Thompson deposition, p. 75-76). Mr. Vanderveldt, General Manager at Wilde, acknowledges that Wilde made money by re-selling, at a profit, Ms. Kolupar's 1993 Pontiac Sunbird (See Mr. Vanderveldt deposition, p. 53). Wilde seeks to focus only on the sale of the 1985 Mercedes to Ms. Kolupar for $8,600.00 and the fact that the vehicle was titled in Mr. Thompson's name prior to the transaction (although Mr. Thompson originally bought the vehicle from Wilde for $5,750.00 in October 1993). The Pontiac-for-Mercedes exchange was a simultaneous transaction at Wilde's showroom, with terms set forth on documents common to both.

Wilde cannot place a managerial employee before the public (with all the trappings of managerial authority and decision-making power) and have this employee initiate a transaction profitable to Wilde with a Wilde customer in which Thompson followed Wilde's procedure regarding used car acquisitions, and then claim that Mr. Thompson was engaging in solely a private or personal transaction. Tammy Kolupar's deposition testimony reveals that Mr. Thompson was the person she primarily dealt with when she bought her Sunbird in 1993, that Mr. Thompson contacted her to invite her to engage in this trade-in (Sunbird-for-Mercedes) transaction, and that Mr. Thompson guided her through this transaction in which she brought her Sunbird to Wilde and picked up the Mercedes in a single afternoon.

The deposition testimony of Ms. Kolupar and of Susan Kolupar demonstrate that Mr. Thompson held himself out throughout the transaction as a Wilde employee (as he had the previous year when Ms. Kolupar purchased the Sunbird from him) and that Mr. Thompson referred Tammy Kolupar to Wilde's bank for financing and utilized Wilde's telephones, financing forms, fax machines, and computer to generate documents showing the transaction was a trade-in (Sunbird-for-Mercedes) and to forward materials to Wilde's bank. These actions, all conducted during the business day at Wilde's showroom, gave this the appearance of a conventional trade-in transaction. Wilde now claims there is no claim for apparent authority in this setting because (Wilde argues) Wilde management did not know that Thompson "was engaging in this transaction" However, Wilde acquiesced (routinely) in similar behavior. Thompson's supervisor (Mr. Zanella) testified that he could remember no policy discouraging Wilde employees from selling personal vehicles on Wilde's location and using Wilde's computer and other facilities (Zanella deposition, p. 106).

Moreover, Wilde took in no fewer than two checks as part of the Kolupar transaction, both of which were cashed by it (See Waukesha State Bank money order, Exhibit "6", and see Badger Mutual check to the Kolupar family, reissued to Wilde Pontiac and cashed by Wilde, Exhibit "5").

Tammy Kolupar's deposition testimony establishes the following:

1) Mr. Thompson invited her to trade in her Pontiac for the Mercedes; which Wilde was "just getting on the lot" (See Tammy Kolupar deposition, p. 35 and Sue Kolupar deposition, p. 36);

2) That the exchange of the Pontiac for the Mercedes was consummated

during the course of a single visit to Wilde's showroom on Moreland Boulevard, in which Tammy delivered the Pontiac which was then taken to the used car department, and in which she was given possession of the Mercedes which was driven to the front of the showroom by an apparent Wilde employee from the rear of the building (where approximately half of Wilde's inventory is located, see Thompson deposition p. 52). Ms. Kolupar considered the transaction completed at that point, leaving only the signing of paperwork at the bank which she accomplished the next morning, March 31st. (See Tammy Kolupar deposition, pp. 54-55). In fact, the check from Waukesha State Bank made payable to Mr. Thompson was sent directly by the bank to Thompson on March 31st, without Ms. Kolupar seeing it and without Ms. Kolupar conveying it in any way. (See Randall Thompson's admission number 32 and Anderson Payne deposition, p. 27).

It is clear that Thompson had, the previous year, represented himself to be Wilde's sales manager. In fact, the business card he had printed for him at Wilde's expense, identified him as the sales manager (See Thompson deposition p. 36). Moreover, Wilde's executive vice president, Mr. Donohue, indicated that sales employees like Thompson (called "closers" in the trade) are given the title of "sales manager" just so that customers will believe that the are dealing with a decision- maker (See Donohue Deposition p. 20).

It is ironic that Wilde takes the position in this transaction that Thompson lacked

authority. Thompson clearly possessed apparent authority, which is precisely what Wilde intended when it clothed him with apparent authority by giving him the title of "Pontiac New Car Sales Manager." Unfortunately, in providing Mr. Thompson with managerial authority, and clothing him with the power to bind the dealership in transactions with the public, Wilde failed to consider Mr. Thompson's character and reliability. According to Mr. Donahue (Vice President for the Wilde Automotive Group) Randall Thompson, as an employee, was " . . . a loose cannon, uncontrollable and unpredictable." (See Donahue deposition, p. 77). In deposition testimony, Wilde admits that Thompson had supervisory authority over sales representatives (See Vanderveldt deposition, p. 27 and Donahue deposition, p. 31).

REMEDIES

or other unconscionable conduct or unfair trade practices set forth in the statute. There is absolutely no question that Sec. 218.01(9) provided a Plaintiff has pleaded claims for the following:

1. Common law fraud or misrepresentation;

2. Claims for misrepresentation/fraud by a motor vehicle dealer, and failure to provide a mandatory inspection and labeling of a used motor vehicle, giving rise to liability under then Sec. 218.01(9)(now Sec. 218.0165(2), Stats.);

3. A claim for odometer fraud;
4. Breach of warranty; and

5. Claims for actual attorneys fees under then Sec. 218.01(9)(now Sec. 218.0163(2), Stats.).

At the time this action was commenced, Sec. 218.01(9) provided civil remedies for a retail purchaser of a motor vehicle against a licensed motor vehicle dealership, in the event of fraudulent misrepresentations remedy for fraud. This was clearly spelled out in several Wisconsin appellate decisions. For example, the Court of Appeals in a 1987 decision stated

that Sec. 218.01(9) provided a remedy for a dealer's deceit, broken promises and misrepresentations. Ford Motor Co. v. Lyons, 137 Wis. 2d 397, 405 N.W. 2d 354(Ct. App. 1987). Moreover, the same statutory scheme provides the consumer with a remedy for odometer fraud. Vic Hansen and Sons v. Comm'nr of Trans., 133 Wis. 2d 450, 395 N.W. 2d 631 (Ct. App. 1986).

RANDALL THOMPSON'S AUTHORITY TO ACT FOR WILDE

Wilde provided Thompson with a business card during the time he worked at Wilde. The card also had the Wilde logo, address and telephone number. In fact, Thompson's title was Pontiac Sales Manager (See response of Randall Thompson to Plaintiff's Requests for Admission, Request Number 6). Thompson wore a shirt or sweater during the work day which carried the name "Wilde" on it (See Thompson's response to Request No. 8). When Thompson first met with Tammy Kolupar in 1993, he identified himself as the "New Car Sales Manager" of Wilde, or words substantially to that effect (See Thompson's response to Request No. 13). On the date of this transaction, Thompson was employed by Wilde in a capacity in which he was authorized to transact new motor vehicle sales and purchases with members of the public on behalf of Wilde (See responses of Thompson and Wilde to Request No. 14). Thompson had previously been employed by Wilde as financing manager (See response of Thompson to Request No. 15). Thompson also had access to Wilde's telephones, facsimile machines, and computers. Among the computer- generated documents he occasionally generated was a form entitled "F & I Deal Worksheet". (See Thompson's and Wilde's response to Request No. 17). On March 30, 1994, it is acknowledged that Thompson used Wilde's computer to generate such a document, Exhibit "3". Thompson used the dealership computer to generate such a document in which it was

represented to Tammy Kolupar that a value had been assigned to her "trade" vehicle of $8,995.00 (See Exhibit "3").

There is no question as to Mr. Thompson's status as a managerial employee at Wilde. Three documents from Mr. Thompson's employment file (including a letter on Wilde stationery setting forth Mr. Thompson's salary structure dated March 1, 1992) identify him as "Pontiac New Car Manager." Also, a "payroll department" memo identifies Mr. Thompson as "New Car Manager" as of his termination date of April 25, 1994 (approximately three weeks after the transaction in question). Also dated April 25, 1994 is an "Employee Termination Checklist" which identifies Mr. Thompson as "NC [New Car] Sales Manager". (See Exhibits "17", "18", and "19").

Wilde admits that on March 30, 1994 (the date of this transaction) Mr. Thompson prepared a financing application, which form he obtained from documents available to him at Wilde's business location (See Wilde's response to Request No. 23). Wilde also admits that Thompson sent over the financing application to Waukesha State Bank on Wilde's facsimile machine utilizing a form that Thompson had obtained by virtue of his position at Wilde (See Wilde's response to Request No. 25). In fact, that financing application (Exhibit "4") demonstrates that this was indeed a trade-in transaction in which Ms. Kolupar was trading in her Pontiac Sunbird for a 1985 Mercedes).

The question of whether Thompson's activities in selling his personal vehicle using the company showroom and facilities, were authorized by Wilde, was essentially answered by the deposition testimony of Mr. Thompson's direct supervisor at the time of this transaction, Joe Zanella. In his deposition testimony, Zanella indicated that he did not remember if Wilde even had a policy discouraging the sale of personal vehicles by

employees on company time. (See Zanella deposition, p. 106). Patrick Donahue, Zanella's superior, testified that he became aware that Mr. Thompson had sold a personal vehicle through use of company facilities including the showroom, computer, fax machine and Wilde's bank before Thompson was terminated. (Donahue Deposition, p. 89). However Zanella testified that those actions were not a factor in the decision to terminate Mr. Thompson approximately three weeks after this transaction (See Zanella deposition, p. 108). If fact, Zanella even went so far as to state that a Wilde sales employee would not be fired even if they sold vehicles belonging to another dealership (like Russ Darrow or Ernie Von Schledorn) at the Wilde showroom and on company time. (See Zanella deposition, p. 117-118). Zanella consistently declined to state that Thompson's actions in utilizing Wilde's computer, its forms, its showroom, its facsimile machine and its bank to sell a personal vehicle in the guise of a Wilde transaction, would constitute grounds for termination (See Zanella deposition, p. 112-113). Donahue acknowledged also that it was common practice for employees to utilize the Wilde computer system and facsimile machine for personal use (See Donahue deposition, p. 48).

Clearly, Wilde allowed employees great latitude in using company resources for personal ends (including sales of personal vehicles), even employees, like Mr. Thompson, that it considered to be a "loose cannon" (See Donahue deposition, p. 77).

DEFENSES

In its defense, Wilde argues that Thompson testified that he told Kolupar that the Mercedes was his and that he had purchased it for his girlfriend and that she had been driving it. However, the deposition testimony of Tammy and of her mother, Susan, indicates that Thompson told them that Wilde was just getting the Mercedes on the lot.

(See deposition of Susan Kolupar, p. 37). Moreover, the documents prepared by Mr. Thompson show the transaction was a trade-in with the Sunbird traded-in on the Mercedes (Exhibits "3" and "4"). Wilde argues that Tammy Kolupar acknowledged that Wilde did not regularly sell Mercedes autos. This is certainly true, but makes little difference in the overall scenario. In fact, Mr. Vanderveldt acknowledged during his deposition that this particular Mercedes had previously been sold by Wilde to Mr. Thompson after Wilde obtained the vehicle in a previous trade-in transaction. (See Vanderveldt deposition, p. 78). Wilde argues that Tammy Kolupar presented a check in payment for the Mercedes directly to Mr. Thompson, which check was made payable to Mr. Thompson. While it is certainly true that the $8,600.00 check from Waukesha State Bank was made payable to Thompson, it is undisputed that two other checks were cashed by Wilde itself, including one for $2,473.39 from Kolupar's insurance company and a check for $702.57 in the form of a money order from Waukesha State Bank, as part of the same Pontiac for Mercedes transaction. (See Exhibits "5" and "6"). Moreover, the bank loan officer, Ms. Anderson-Payne, testified that the check payment for the Mercedes went directly with Mr. Thompson (See Anderson-Payne deposition, p. 27). Further, Mr. Thompson has admitted in his responses to Plaintiff's Requests for Admissions that the check from the bank to Mr. Thompson was delivered directly by a bank employee, through the mail, to Mr. Thompson (See Thompson response to Request No. 32), without involvement by Ms. Kolupar.

Clearly, Wilde received Kolupar's check from Badger Mutual for the vehicle damage, since the check copy bears the endorsement stamp for Wilde Pontiac Cadillac for deposit to Wilde's account at Waukesha State Bank. (Exhibit "6").

Wilde also argues that Kolupar should have known this was not a Wilde transaction,

since she was not asked to sign or review documents at the dealership. However, Thompson testified that he gave the Wilde "F & I Deal Worksheet" which carried the Wilde deal number of 19473 (establishing this as a uniquely-numbered and distinct Wilde transaction) to Ms. Kolupar at the dealership. Moreover, he prepared for her, and she signed at the dealership, the financing application. He also told her additional documents would need to be signed by her, as part of the transaction, at the bank. Thus, it is hardly true that Ms. Kolupar did not sign enough documents or receive sufficient materials to make it plausible that this was a Wilde Transaction. The "F & I Deal Worksheet" and the GMAC financing application alone make this appear to be a dealership sale.

ANALYSIS

1. Wilde Pontiac, Cadillac, Inc. placed Randall Thompson before the public, possessing a managerial title and possessing all the trappings of managerial authority;
2. Wilde's management acknowledges that Mr. Thompson was "a loose cannon, uncontrollable and unpredictable";
3. Mr. Thompson's supervisor at the time, Mr. Zanella, said Wilde has no policy prohibiting the sale of personal vehicles on company time, using company facilities. Please note there was no expectation that an employee would be disciplined for doing so.
4. Mr. Thompson had financial problems, including serious and long-standing difficulties with both state and federal taxing authorities (See Amy Mueller Huber deposition, pp. 34-35, Exhibit "20").
5. Under all appearances to a relatively unsophisticated 18-year-old, such as Tammy Kolupar, this was a standard trade-in transaction, as the documents

prepared by Mr. Thompson indicated. The "F & I Deal Worksheet" had a unique Wilde deal number (Deal No. 19473). The transaction was consummated at Wilde's showroom, during the business day. Wilde's computer generated documents. Other documents were prepared from forms maintained by Wilde. Wilde's back provided the financing. Tammy Kolupar's Sunbird was delivered to Wilde and driven to the used car department by a Wilde employee. The Mercedes was delivered to Kolupar at Wilde from the rear of the building (where the used car inventory was kept) apparently by a Wilde employee.

6. The financial application was filled out at the showroom by Mr. Thompson, where it was signed by Ms. Kolupar and then sent by Wilde's fax to Wilde's own bank, Waukesha State Bank, so the Bank could make its financing decision. This was the routine utilized in a regular Wilde Transaction. (See Sandy Anderson-Payne deposition, p. 26 and Patrick Donahue deposition, pp. 84-85). It is important to note that Mr. Thompson selected Wilde's bank, Waukesha State Bank, because he knew that Bank would finance 100% of the value of the vehicle, without requiring a co-signer. In this way, he eliminated any potential "veto power" by Ms. Kolupar's parents, particularly, Ms. Kolupar's mother, Susan Kolupar, who advised her and had served as co-signer at the time Ms. Kolupar purchased the 1993 Sunbird at Wilde.

CONCLUSION

Mr. Thompson, having been given the power to bind Wilde contractually, set up a bogus trade-in transaction which profited him (receiving $8,600.00 for a car he had purchased six months earlier for $5,350.00) and which also, interestingly, profited Wilde

which credited Ms. Kolupar with $7,500.00 for the value of the Sunbird, but was paid $11,495.00 when it sold the Sunbird to a Brown Deer resident named Joan Kojis (See Exhibit "21").

Unfortunately, the Mercedes had not been inspected as the law requires for used cars sold by dealerships. The car had significant mechanical problems and required repairs within one month. The odometer and speedometer were found to not function. The vehicle was found to have a bent front axle. The vehicle experienced severe driveability problems, stalling and dying in traffic, and requiring great efforts to start. Finally, the vehicle failed to start altogether. Ultimately, the vehicle was sold to a private individual several months after its purchase at Wilde, for $2,000.00.

Wilde, having put Mr. Thompson in a position of authority, must now answer for his actions in that role of authority.

Respectfully submitted this 9th day of May, 2001.

LISKO & ERSPAMER, S.C.
Attorneys for Plaintiff

By:_____
Paul M. Erspamer
State Bar No. 010824

MAILING ADDRESS:
Sunset Plaza, Suite 201
W229 N1433 Westwood Drive
Waukesha, Wisconsin 53186
(262) 896-2090
(262) 896-2081

APPENDIX 14

WILLIE HUNTER FAX:414-342-0002 10:01 AM

GMAC FINANCIAL SERVICES

CUSTOMER'S STATEMENT—PLEASE PRINT APPLICATION NUMBER

EXHIBIT C tabbies

☐ Individual credit—applying for credit in your own name and relying on your own income or assets as the basis for repayment of the credit requested. Do not list income or assets of a married Wisconsin resident) as the basis for repayment of the credit requested.

Check Appropriate Box ☐ Joint Credit—applying for joint credit with another person. (Relationship to co-applicant, if any _____)

☐ Individual Credit—applying for credit in your own name but relying on income from alimony, child support, or separate maintenance or another person as the basis for repayment of the credit requested.

PRINT FULL NAME: FIRST Tammy MIDDLE Lynn LAST Eckjian Sr. Jr. | SOC SEC NO/TIN 391 94 3254 | DATE OF BIRTH MO. 12 DAY 25 | HOME PHONE NO. 541-2015

PRESENT ADDRESS: NUMBER AND STREET 1225 S. 92nd CITY West Allis COUNTY Milw STATE WI ZIP CODE 53214 | LIVED THERE YEARS 2 MONTHS

RENT BY MO. LEASE OWN: LANDLORD OR MORTGAGE HOLDER NAME Linda R Ebner | MO. PYMT. OR RENT $ 600

NUMBER AND STREET _____ CITY _____ COUNTY _____ STATE _____ ZIP CODE _____ | LIVED THERE YEARS _____ MONTHS _____

PREVIOUS HOME ADDRESS

EMPLOYED BY SELF ☐ OTHERS ☐ NAME Parker Tyme & Cummings BUSINESS ADDRESS, NUMBER AND STREET 2nd Layer CITY _____ STATE _____ | HOW LONG YEARS 2 MONTHS 7 | BUS. PHONE NO. 328-8601

TRADE OR OCCUPATION Host | SALARY OR WAGES $ 1200— | NAME OF PREVIOUS EMPLOYER _____ ADDRESS _____ BUS. PHONE NO. _____

Alimony, child support, or separate maintenance income need not be revealed if you do not wish to have it considered as a basis for repaying this obligation

TYPE OF OTHER INCOME Vegas Club | SOURCE Whitney | MONTHLY AMOUNT $ 600— | PHONE NO. _____ | RELATIONSHIP _____

NAME AND ADDRESS OF PARENTS OR NEAREST RELATIVE NOT LIVING WITH ME: NAME _____ ADDRESS _____ PHONE NO. _____ | KNOWN HOW LONG? _____

NAME AND ADDRESS OF PERSONAL FRIEND: NAME _____ ADDRESS _____ PHONE NO. _____

BANK ACCOUNT: NAME OF BANK 1st Financial Bank | BRANCH NAME AND CITY _____ | CHECKING SAVINGS NO ACCOUNT ☐ | CHECKING ACCOUNT NO. _____

LAST CAR FINANCED: NAME OF CREDITOR Ford - Tasca | BALANCE DUE OR DATE PAID _____ | TRADING IN THIS CAR? ☐ YES ☐ NO

NAME OF CREDITOR _____ ADDRESS _____ ACCOUNT NO. _____

THE CAR WILL BE REGISTERED IN NAME OF Tammy Lynn Eckjian NUMBER AND STREET 1225 S 92nd CITY West Allis STATE WI ZIP CODE 53214

CAR TYPE: NEW ☐ USED ☒ | YEAR 96 | MAKE Mercury | MODEL # GS | DESCRIPTION SDL | MILEAGE _____ | VIN _____ | SALESPERSON _____

1—W/O AIR CONDITIONING ☐ 2—SUNROOF ☐ 3—STEREO ☐ 4—CRUISE ☐ 5—POWER WINDOWS ☐ 6—POWER SEATS ☐ 7—FOUR WHEEL DRIVE ☐ 8—MANUAL TRANS ☐ 9—ALUM/WIRE WHEELS ☐

OTHER (DISCLOSE) _____

TRADE-IN: YEAR _____ MAKE _____ DESCRIPTION _____ | TERM OF CONTRACT Cash | DEALER _____ | DEALER NO. _____

CASH PRICE (LINE 1 OF CONTRACT) 2750 | LESS: NET TRADE _____ | CASH 500 | REBATES (DISCLOSE) _____ | OTHER (DISCLOSE) _____ | TOTAL DOWN PAYMENT 500 | UNPAID BALANCE 2250 | FILES INSURANCE CHARGES 1400 | OTHER CHARGES 150 | TOTAL AMOUNT FINANCED 3800 | (MSRP $ _____) | SPECIAL PROGRAM (DESCRIBE THE BUYER COLLEGE GRAD, ETC.) $600

PRINT FULL NAME: FIRST _____ MIDDLE _____ LAST _____ Sr. Jr. | SOC SEC NO/TIN _____ | DATE OF BIRTH MO. 3 DAY 21 YR 64 | HOME PHONE NO. _____

PRESENT ADDRESS: NUMBER AND STREET _____ CITY 8600 | 56 MILES STATE 12 ZIP CODE 9 | LIVED THERE YEARS _____ MONTHS _____

RENT BY MO. LEASE OWN: LANDLORD OR MORTGAGE HOLDER NAME _____ | MO. PYMT. OR RENT $ _____

PREVIOUS HOME ADDRESS: NUMBER AND STREET _____ CITY _____ COUNTY _____ STATE _____ ZIP CODE _____ | LIVED THERE YEARS _____ MONTHS _____

EMPLOYED BY SELF ☐ OTHERS ☐ NAME _____ BUSINESS ADDRESS, NUMBER AND STREET _____ CITY _____ STATE _____ | HOW LONG YEARS _____ MONTHS _____ | BUS. PHONE NO. _____

TRADE OR OCCUPATION _____ | SALARY OR WAGES $ _____ | NAME OF PREVIOUS EMPLOYER _____ ADDRESS _____ BUS. PHONE NO. _____

Alimony, child support, or separate maintenance income need not be revealed if you do not wish to have it considered as a basis for repaying this obligation

TYPE OF OTHER INCOME _____ | SOURCE _____ | MONTHLY AMOUNT $ _____

BANK ACCOUNT: NAME OF BANK _____ | BRANCH NAME AND CITY _____ | CHECKING SAVINGS NO ACCOUNT ☐ | CHECKING ACCOUNT NO. _____

LAST CAR FINANCED: NAME OF CREDITOR _____ | BALANCE DUE OR DATE PAID _____ | TRADING IN THIS CAR? ☐ YES ☐ NO

NAME OF CREDITOR _____ ACCOUNT NO. _____

EXHIBIT 10 tabbies

MAY DISCLOSE THE PERSON THROUGH WHOM GAP INSURANCE IS SOLD

WILLIE MUNTIME

FAX-414-342-0004

10:00 AM

GMAC FINANCIAL SERVICES

CUSTOMER'S STATEMENT—PLEASE PRINT

APPLICATION NUMBER

☐ Individual Credit—applying for credit in your own name and relying on your own income or assets and not the income or assets of another person (except ma... income or assets, if a married Wisconsin resident) as the basis for repayment of the credit requested.

Check Appropriate Box ☐ Joint Credit—applying for joint credit with another person. (Relationship to co-applicant, if any _____)

☐ Individual Credit—applying for credit in your own name but relying on income from alimony, child support, or separate maintenance or on the income or assets of another person as the basis for repayment of the credit requested.

PRINT FULL NAME	FIRST: Tammy	MIDDLE: Lynn	LAST: Edgerson	Sr. Jr.	SOC. SEC. NO./TIN: 391 94 2254	DATE OF BIRTH MO. DAY YR: 5 22 [illegible]	HOME PHONE NO.: 521205		
PRESENT ADDRESS	NUMBER AND STREET: 1225 S. 92nd	CITY: West Allis	COUNTY: Milw	STATE: Wis	ZIP CODE: 53214	LIVED THERE YEARS: [illegible]	MONTHS:		
RENT BY MO. ☐ LEASE ☐ OWN ☐	LANDLORD OR MORTGAGE HOLDER NAME: Linda Q Hmar					MO. PYMT. OR RENT $: [illegible]			
PREVIOUS HOME ADDRESS	NUMBER AND STREET: [illegible]	CITY: [illegible]	COUNTY: [illegible]	STATE: [illegible]	ZIP CODE: [illegible]	LIVED THERE YEARS: [illegible]	MONTHS: [illegible]		
EMPLOYED BY SELF ☐ OTHERS ☐	NAME: Carter Time Cummings Wal Lawn	BUSINESS ADDRESS, NUMBER AND STREET: [illegible]	CITY: [illegible]	STATE: [illegible]	HOW LONG YEARS: 2	MONTHS: 3	BUS. PHONE NO.: 328-8621		
TRADE OR OCCUPATION: Clerk	SALARY OR WAGES: $ 1200.—	NAME OF PREVIOUS EMPLOYER: [illegible]	ADDRESS: [illegible]				NO. YRS.: [illegible]		

Alimony, child support, or separate maintenance income need not be revealed if you do not wish to have it considered as a basis for repaying this obligation

TYPE OF OTHER INCOME: [illegible]	SOURCE: Vegas Club	NAME: Whitefoss	MONTHLY AMOUNT: $ 600.—
NAME AND ADDRESS OF PARENTS OR NEARBY RELATIVE - NOT LIVING WITH ME	NAME: [illegible]	ADDRESS: [illegible]	PHONE NO.: [illegible] RELATIONSHIP: [illegible]
NAME AND ADDRESS OF PERSONAL FRIEND	NAME: [illegible]	ADDRESS: [illegible]	PHONE NO.: [illegible] KNOWN HOW LONG?: [illegible]

BANK ACCOUNT: [illegible]	NAME OF BANK: St Francis Bank	BRANCH NAME AND CITY: [illegible]	CHECKING ☐ SAVINGS ☐ NO ACCOUNT ☐	CHECKING ACCOUNT NO.: [illegible]
LAST CAR FINANCED: [illegible]	NAME OF CREDITOR: [illegible]	BALANCE DUE OR DATE PAID: [illegible]	TRADING IN THIS CAR? ☐ YES ☐ NO	

CREDIT REFERENCES OR PERSONAL OBLIGATIONS — INCLUDE NUMBER OF APPLICANT BY WHICH CREDIT CAN BE VERIFIED, IF OTHER THAN SHOWN ABOVE

NAME OF CREDITOR: [illegible]	ADDRESS: [illegible]	ACCOUNT NO.: [illegible]

THE CAR WILL BE REGISTERED IN NAME OF: Tammy Lynn Edgerson — NUMBER AND STREET: 1225 S. 92nd — CITY: West Allis — STATE: [illegible] — ZIP CODE: [illegible]

CA TYPE	NEW ☐ USED ☒	YEAR: 85	MAKE: Mercedes		
MODEL #: 190	DESCRIPTION: 4DR	MILEAGE: 6			
VIN: [illegible]	SALESPERSON: [illegible]				

1—WIND CONDITIONING ☐ 2—SUNROOF ☐ 3—STEREO ☐
4—CRUISE ☐ 5—POWER WINDOWS ☐ 6—POWER SEATS ☐
7—FOUR WHEEL DRIVE ☐ 8—MANUAL TRANS. ☐ 9—ALUM./MAG WHEELS ☐
OTHER (DESCRIBE): [illegible]

TRADE-IN	YEAR: 85	MAKE: Pontiac	DESCRIPTION: [illegible]
TERM OF CONTRACT: 48 MOS.	DEALER: [illegible]	DEALER NO.: [illegible]	

CASH PRICE (LINE 1 OF CONTRACT)	$ 12086.08
LESS: NET TRADE	$ 2500
CASH	$ [illegible]
REBATES (DESCRIBE)	$ [illegible]
OTHER (DESCRIBE)	$ [illegible]
TOTAL DOWNPAYMENT	$ 2750
UNPAID BALANCE	$ [illegible]
PLUS INSURANCE CHARGES	$ [illegible]
OTHER CHARGES	$ [illegible]
TOTAL AMOUNT FINANCED	$ [illegible]
(MSRP $ [illegible]) SPECIAL PROGRAM (EG. FIRST TIME BUYER, COLLEGE GRAD, ETC.)	$ [illegible]

8600 — 36 mos — 12%

PRINT FULL NAME	FIRST: [illegible]	MIDDLE: [illegible]	LAST: [illegible]	Sr. Jr.	SOC. SEC. NO./TIN: [illegible]	DATE OF BIRTH MO. DAY YR: 3 21 94	HOME PHONE NO.: [illegible]		
PRESENT ADDRESS	NUMBER AND STREET: [illegible]	CITY: [illegible]	COUNTY: [illegible]	STATE: [illegible]	ZIP CODE: [illegible]	LIVED THERE YEARS: [illegible]	MONTHS: [illegible]		
RENT BY MO. ☐ LEASE ☐ OWN ☐	LANDLORD OR MORTGAGE HOLDER NAME: [illegible]					MO. PYMT. OR RENT $: [illegible]			
PREVIOUS HOME ADDRESS	NUMBER AND STREET: [illegible]	CITY: [illegible]	COUNTY: [illegible]	STATE: [illegible]	ZIP CODE: [illegible]	LIVED THERE YEARS: [illegible]	MONTHS: [illegible]		
EMPLOYED BY SELF ☐ OTHERS ☐	NAME: [illegible]	BUSINESS ADDRESS, NUMBER AND STREET: [illegible]	CITY: [illegible]	STATE: [illegible]	HOW LONG YEARS: [illegible]	MONTHS: [illegible]	BUS. PHONE NO.: [illegible]		
TRADE OR OCCUPATION: [illegible]	SALARY OR WAGES: $ [illegible]	NAME OF PREVIOUS EMPLOYER: [illegible]	ADDRESS: [illegible]				NO. YRS.: [illegible]		

Alimony, child support, or separate maintenance income need not be revealed if you do not wish to have it considered as a basis for repaying this obligation

TYPE OF OTHER INCOME: [illegible]	SOURCE: [illegible]	NAME: [illegible]	MONTHLY AMOUNT: $ [illegible]
NAME AND ADDRESS OF PARENTS OR NEARBY RELATIVE - NOT LIVING WITH ME	NAME: [illegible]	ADDRESS: [illegible]	PHONE NO.: [illegible] RELATIONSHIP: [illegible]
NAME AND ADDRESS OF PERSONAL FRIEND	NAME: [illegible]	ADDRESS: [illegible]	PHONE NO.: [illegible] KNOWN HOW LONG?: [illegible]

BANK ACCOUNT: [illegible]	NAME OF BANK: [illegible]	BRANCH NAME AND CITY: [illegible]	CHECKING ☐ SAVINGS ☐ NO ACCOUNT ☐	CHECKING ACCOUNT NO.: [illegible]
LAST CAR FINANCED: [illegible]	NAME OF CREDITOR: [illegible]	BALANCE DUE OR DATE PAID: [illegible]	TRADING IN THIS CAR? ☐ YES ☐ NO	

CREDIT REFERENCES OR PERSONAL OBLIGATIONS — INCLUDE NUMBER OF APPLICANT BY WHICH CREDIT CAN BE VERIFIED, IF OTHER THAN SHOWN ABOVE

NAME OF CREDITOR: [illegible]	ADDRESS: [illegible]	ACCOUNT NO.: [illegible]

EXHIBIT 10

Automobile insurance is required for the full term of the Contract, at your expense, against the hazards of fire, theft and accidental physical damage to the vehicle, with coverage and deductible amounts satisfactory to SMAC. The policies issued by the insurance company will describe the terms and conditions. If the unpaid balance of cash price is disclosed, you must also insure to protect the interests of your secured party. YOU MAY CHOOSE THE PERSON THROUGH WHOM ANY INSURANCE IS OBTAINED.

Do you desire that the above coverage be purchased through us? ☐ YES ☐ NO

APPENDIX 15

MAR 30, 1994 F&I - DEAL WORKSHEET 4770

1 DEAL NO	19473	10 CASH DOWN	2000.00	19 TERM	36
2 DEAL DTE	03/30/94	11 DEPOSIT		20 PYMNTS/YR	12
3 STOCK NO		12 LIC FEE		21 DAYS	45
4 PRICE	8995.00	13 TITLE FEE	12.50	22 AOR	6.52
5 MSRP		14 LIEN FEE	4.00	23 APR	12.00
6 BALLOON		15 TIRE FEE		24 STATE TAX RTE	5.00
7 REBATE		16 OTHER FEES		25 COUNTY TAX RTE	
8 TRADE	8995.00	17 WARR PREM		26 MON PYMT %	
9 PAYOFF	10300.00	18 RUST PROOF		27 LUX TAX (Y/N)	
				28 ADJ.	

A=ADDL COMMANDS	L=CLEAR DEAL	X/X#=LEASE CONV	<F12>=CLOSE DEAL
CB/CB#=CRED BUR	N=ROLL PAYMENT	Y=ROLL GROSS	SH<F9>=SALES MGR REVIEW
D/D#=DESK DEALS	R=PER DAY COSTS	Z=MINI QUICK QUOTE	SH<F10>=DISP GROSSES
I/I#=INSURANCE	Q/Q#=BANK SELECT	<F10>=DEAL RECALL	<CTRL>I=MO PYMTS (INS)
J=DEAL REVIEW	W=LEASE COMPARISON	<F11>=STORE DEAL	<CTRL>O=MO PYMTS (TERM)

(LINE#)(M=MODIFY)(COMMAND)
SHIFT F1=FKEYS BANK=GMAC MONTHLY PYMT (10) 277.58

APPENDIX 16

[Previous Document in Book] [Next Document in Book]

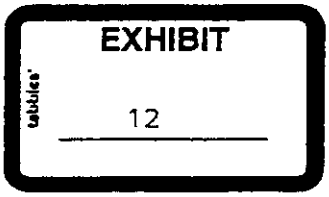
365. BRIEFING OF OTHER MOTIONS

(a) If a movant desires to file a brief, affidavit, or other documents in support of a motion other than one for summary judgment or dismissal, such motion and supporting materials shall be received by all counsel of record and/or parties not represented by counsel of record and filed with the deputy court clerk of the assigned judge no later than 10 calendar days (including Saturdays, Sundays and holidays) before the time specified for the hearing.

(b) Response briefs, affidavits, or other supporting documents in opposition to such motions must be received by the movant and filed with the deputy court clerk of the assigned judge no later than 5 calendar days (including Saturdays, Sundays and holidays) (e.g. by 5:00 p.m. Wednesday for a Monday motion) prior to the hearing of the motion.

[Previous Document in Book] [Next Document in Book]

Copyright © 2002 Loislaw.com, Inc. All Rights Reserved



APPENDIX 17

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

TAMMY KOLUPAR,

Plaintiff,

vs.

Case No. 00 CV 002571

Code No. 30703

WILDE PONTIAC, CADILLAC, INC.,
a Wisconsin corporation, and
RANDALL THOMPSON,

Defendants.

OFFER OF JUDGMENT

Pursuant to Wis. Stat. § 807.01(1), the Defendant, Wilde Pontiac, Cadillac, Inc., hereby offers to allow judgment to be taken against said Defendant in the above-captioned matter for the sum of Six Thousand Six Hundred ($6,600) Dollars plus the taxable costs of the action.

Dated this 13th day of December, 2001.

CRAMER, MULTHAUF & HAMMES, LLP,
Attorneys for Defendant Wilde Pontiac, Cadillac, Inc.

BY: _____
Kathryn Sawyer Gutenkunst
(State Bar No. 01000329)

CRAMER, MULTHAUF & HAMMES, LLP
Suite 200
1601 East Racine Avenue
P.O. Box 558
Waukesha, WI 53187
(262)-542-4278

LAW OFFICES OF
CRAMER, MULTHAUF
& HAMMES, LLP
1601 RACINE AVENUE
WAUKESHA, WI 53186

EXHIBIT
13

APPENDIX 18

LISKO & ERSPAMER, S.C.

5/9/2002

Register: 1201 · Accounts Receivable
From 01/01/1995 through 05/09/2002
Sorted by: Date, Type, Number/Ref

Date	Number	Customer	Memo/Description	Qty	Rate	Charge	Paid	Balance
02/29/2000		Kolupar, Tammy	photocopies	2	0.15	0.30		0.30
02/29/2000		Kolupar, Tammy	postage		0.66	0.66		0.96
03/15/2000		Kolupar, Tammy	Faxes	2	0.50	1.00		1.96
03/29/2000		Kolupar, Tammy	Mileage Reimbursem...	19	0.26	4.94		6.90
03/29/2000		Kolupar, Tammy	Parking		0.50	0.50		7.40
04/10/2000	106	Kolupar, Tammy				1,856.00		1,863.40
04/11/2000		Kolupar, Tammy	Postage		0.99	0.99		1,864.39
04/13/2000		Kolupar, Tammy	photocopies	17	0.15	2.55		1,866.94
04/21/2000		Kolupar, Tammy	Legal Process Servic...		68.00	68.00		1,934.94
04/21/2000		Kolupar, Tammy	postage		0.33	0.33		1,935.27
05/02/2000		Kolupar, Tammy	Klitzke & Assoc.--in...	1	80.00	80.00		2,015.27
05/19/2000		Kolupar, Tammy	faxes	6	0.50	3.00		2,018.27
06/22/2000		Kolupar, Tammy	faxes	2	0.50	1.00		2,019.27
06/28/2000		Kolupar, Tammy	postage		0.33	0.33		2,019.60
07/12/2000		Kolupar, Tammy	photocopies	3	0.15	0.45		2,020.05
07/28/2000		Kolupar, Tammy	faxes	6	0.50	3.00		2,023.05
08/03/2000		Kolupar, Tammy	faxes	8	0.50	4.00		2,027.05
08/03/2000		Kolupar, Tammy	Mileage Reimbursem...	9	0.26	2.34		2,029.39
08/08/2000		Kolupar, Tammy	Mileage Reimbursem...	19	0.26	4.94		2,034.33
08/08/2000		Kolupar, Tammy	meter parking		1.00	1.00		2,035.33
08/11/2000		Kolupar, Tammy	Faxes	2	0.50	1.00		2,036.33
08/23/2000		Kolupar, Tammy	postage		0.66	0.66		2,036.99
09/25/2000		Kolupar, Tammy	Mileage Reimbursem...	10	0.26	2.60		2,039.59
09/25/2000		Kolupar, Tammy	meter parking		1.00	1.00		2,040.59
09/28/2000		Kolupar, Tammy	faxes	2	0.50	1.00		2,041.59
09/28/2000		Kolupar, Tammy	Gramaan Reporting ...	1	55.97	55.97		2,097.56
10/02/2000		Kolupar, Tammy	photocopies	50	0.15	7.50		2,105.06
10/20/2000		Kolupar, Tammy	Faxes	2	0.50	1.00		2,106.06
11/01/2000		Kolupar, Tammy	photocopies	5	0.15	0.75		2,106.81
11/17/2000		Kolupar, Tammy	postage		2.86	2.86		2,109.67
11/17/2000		Kolupar, Tammy	faxes	1	0.50	0.50		2,110.17
11/22/2000		Kolupar, Tammy	faxes	32	0.50	16.00		2,126.17
12/31/2000		Kolupar, Tammy	December postage		4.11	4.11		2,130.28
12/31/2000		Kolupar, Tammy	photocopies	89	0.15	13.35		2,143.63
01/12/2001		Kolupar, Tammy	faxes	2	0.50	1.00		2,144.63
01/15/2001		Kolupar, Tammy	faxes	2	0.50	1.00		2,145.63
01/22/2001		Kolupar, Tammy	faxes	3	0.50	1.50		2,147.13
01/25/2001		Kolupar, Tammy	faxes	2	0.50	1.00		2,148.13
01/25/2001		Kolupar, Tammy	faxes	2	0.50	1.00		2,149.13
01/30/2001		Kolupar, Tammy	postage	1	0.34	0.34		2,149.47

Register: 1201 · Accounts Receivable

From 01/01/1995 through 05/09/2002

Sorted by: Date, Type, Number/Ref

Date	Number	Customer	Memo/Description	Qty	Rate	Charge	Paid	Balance
01/31/2001	1749	Kolupar, Tammy				783.00		2,932.47
01/31/2001		Kolupar, Tammy	postage	1	0.68	0.68		2,933.15
02/01/2001		Kolupar, Tammy	postage	1	0.68	0.68		2,933.83
02/02/2001		Kolupar, Tammy	Kolupar 01/31/01		50.00	50.00		2,983.83
02/02/2001		Kolupar, Tammy	Kolupar		50.00	50.00		3,033.83
02/08/2001		Kolupar, Tammy	postage	1	1.36	1.36		3,035.19
02/08/2001		Kolupar, Tammy	postage	1	1.36	1.36		3,036.55
02/08/2001		Kolupar, Tammy	FAXES	17	0.50	8.50		3,045.05
02/12/2001		Kolupar, Tammy	postage	1	1.02	1.02		3,046.07
02/19/2001		Kolupar, Tammy	FAXES	2	0.50	1.00		3,047.07
02/20/2001		Kolupar, Tammy	POSTAGE	1	1.02	1.02		3,048.09
02/22/2001	1763	Kolupar, Tammy				2,217.62		5,265.71
02/22/2001	1765	Kolupar, Tammy				9,635.25		14,900.96
02/27/2001		Kolupar, Tammy	Ray Reporting-Dona...		606.30	606.30		15,507.26
03/01/2001		Kolupar, Tammy	copies	525	0.15	78.75		15,586.01
03/05/2001		Kolupar, Tammy	FAXES	7	0.50	3.50		15,589.51
03/08/2001		Kolupar, Tammy	FAXES	2	0.50	1.00		15,590.51
03/08/2001		Kolupar, Tammy	Ray Reporting-Joe Z...		586.50	586.50		16,177.01
03/31/2001	1778	Kolupar, Tammy				6,314.75		22,491.76
04/06/2001		Kolupar, Tammy	Kolupar-19 mi-02/02...		6.55	6.55		22,498.31
04/06/2001		Kolupar, Tammy	Kolupar-parking-02/...		7.00	7.00		22,505.31
04/06/2001		Kolupar, Tammy	Kolupar-03/07/01-23...		23.34	23.34		22,528.65
04/06/2001		Kolupar, Tammy	Kolupar-03/07/01-pa...		0.50	0.50		22,529.15
04/17/2001		Kolupar, Tammy	Photocopies	14	0.15	2.10		22,531.25
04/26/2001		Kolupar, Tammy	Mileage Reimbursem...	19	0.345	6.56		22,537.81
04/26/2001		Kolupar, Tammy	Parking	1	1.00	1.00		22,538.81
05/02/2001		Kolupar, Tammy	Postage	2	0.34	0.68		22,539.49
05/08/2001		Kolupar, Tammy	Postage	1	2.28	2.28		22,541.77
05/10/2001		Kolupar, Tammy	Faxes	3	0.50	1.50		22,543.27
05/11/2001		Kolupar, Tammy	Postage	3	0.97	2.91		22,546.18
05/15/2001		Kolupar, Tammy	Photocopies	89	0.15	13.35		22,559.53
05/21/2001		Kolupar, Tammy	mediation fee-hon. F...		500.00	500.00		23,059.53
05/22/2001	1795	Kolupar, Tammy				4,654.50		27,714.03
05/23/2001		Kolupar, Tammy	costs				134.03	27,580.00
05/24/2001		Kolupar, Tammy	court reporter for hea...		208.58	208.58		27,788.58
05/24/2001		Kolupar, Tammy	copy of transcript for...		81.50	81.50		27,870.08
05/24/2001		Kolupar, Tammy	Mileage Reimbursem...	38	0.345	13.11		27,883.19
05/24/2001		Kolupar, Tammy	street parking	1	2.00	2.00		27,885.19
05/30/2001		Kolupar, Tammy	Mileage Reimbursem...	19	0.345	6.56		27,891.75
05/30/2001		Kolupar, Tammy	certified copies		5.00	5.00		27,896.75

Register: 1201 · Accounts Receivable

From 01/01/1995 through 05/09/2002

Sorted by: Date, Type, Number/Ref

Date	Number	Customer	Memo/Description	Qty	Rate	Charge	Paid	Balance
06/01/2001		Kolupar, Tammy	Register of Deeds	1	1.50	1.50		27,898.25
06/01/2001		Kolupar, Tammy	certified copies	1	20.00	20.00		27,918.25
06/05/2001		Kolupar, Tammy	Postage	1	0.68	0.68		27,918.93
06/06/2001		Kolupar, Tammy	Postage	1	2.88	2.88		27,921.81
06/13/2001		Kolupar, Tammy	Photocopies	362	0.15	54.30		27,976.11
06/13/2001		Kolupar, Tammy	Mileage Reimbursem...	8.5	0.345	2.93		27,979.04
06/13/2001		Kolupar, Tammy	parking	1	4.00	4.00		27,983.04
06/14/2001		Kolupar, Tammy					500.00	27,483.04
06/14/2001		Kolupar, Tammy	search for Frank Holl...		300.00	300.00		27,783.04
06/18/2001	1803	Kolupar, Tammy				3,248.00		31,031.04
07/16/2001		Kolupar, Tammy	Hearing fees-Frank C...		500.00	500.00		31,531.04
07/16/2001		Kolupar, Tammy	Amy Huber depo.		273.45	273.45		31,804.49
07/17/2001		Kolupar, Tammy	transcript from heari...		184.15	184.15		31,988.64
07/17/2001		Kolupar, Tammy	Mileage Reimbursem...	38	0.345	13.11		32,001.75
07/17/2001		Kolupar, Tammy	meter parking	1	2.00	2.00		32,003.75
07/24/2001	1805	Kolupar, Tammy				2,842.00		34,845.75
07/24/2001		Kolupar, Tammy	Photocopies	143	0.15	21.45		34,867.20
07/24/2001		Kolupar, Tammy	Postage	1	9.80	9.80		34,877.00
07/24/2001		Kolupar, Tammy	Faxes-05/15/01-07/2...	95	0.50	47.50		34,924.50
07/27/2001		Kolupar, Tammy	Mileage Reimbursem...	10	0.345	3.45		34,927.95
07/27/2001		Kolupar, Tammy	Witness Fee-Dexter ...		16.00	16.00		34,943.95
07/27/2001		Kolupar, Tammy	mileage-Dexter Whit...		13.00	13.00		34,956.95
07/27/2001		Kolupar, Tammy	Faxes	4	0.50	2.00		34,958.95
07/30/2001		Kolupar, Tammy	Faxes	2	0.50	1.00		34,959.95
07/31/2001		Kolupar, Tammy	Mileage Reimbursem...	4	0.345	1.38		34,961.33
07/31/2001		Kolupar, Tammy	Faxes	2	0.50	1.00		34,962.33
08/04/2001		Kolupar, Tammy	mediation fee--Zick		350.00	350.00		35,312.33
08/06/2001		Kolupar, Tammy	service fees		117.95	117.95		35,430.28
08/09/2001		Kolupar, Tammy	Ray Reporting Jamey...		451.75	451.75		35,882.03
08/10/2001		Kolupar, Tammy	Faxes	6	0.50	3.00		35,885.03
08/16/2001		Kolupar, Tammy					200.00	35,685.03
08/16/2001		Kolupar, Tammy	Mileage Reimbursem...	18	0.345	6.21		35,691.24
08/16/2001		Kolupar, Tammy	Hearing fee-Hon. Cri...		500.00	500.00		36,191.24
08/22/2001		Kolupar, Tammy	court reporter for arb...		164.15	164.15		36,355.39
08/24/2001		Kolupar, Tammy	depo. Braun		422.65	422.65		36,778.04
08/30/2001		Kolupar, Tammy	Postage	1	1.02	1.02		36,779.06
09/01/2001		Kolupar, Tammy	PI-Mr. Dexter White		50.00	50.00		36,829.06
09/06/2001		Kolupar, Tammy	Postage	1	1.36	1.36		36,830.42
09/11/2001		Kolupar, Tammy	Mileage Reimbursem...	18	0.345	6.21		36,836.63
09/12/2001		Kolupar, Tammy	SERVICE FEES		27.76	27.76		36,864.39

Register: 1201 · Accounts Receivable

From 01/01/1995 through 05/09/2002

Sorted by: Date, Type, Number/Ref

Date	Number	Customer	Memo/Description	Qty	Rate	Charge	Paid	Balance
10/04/2001		Kolupar, Tammy	remiaining mediation...		175.00	175.00		37,039.39
11/25/2001		Kolupar, Tammy	Hon. Frank Crivello		1,350.00	1,350.00		38,389.39
11/26/2001		Kolupar, Tammy	prep and revise letter ...	0.7	195.00	136.50		38,525.89
11/27/2001		Kolupar, Tammy	Mileage Reimbursem...	9	0.345	3.11		38,529.00
11/28/2001		Kolupar, Tammy	conf w pme; plan ord...	2.3	195.00	448.50		38,977.50
11/29/2001		Kolupar, Tammy	kolupar		54.50	54.50		39,032.00
12/05/2001		Kolupar, Tammy	mediation-Zick		400.00	400.00		39,432.00
12/05/2001		Kolupar, Tammy	Mileage Reimbursem...	19	0.345	6.56		39,438.56
12/05/2001		Kolupar, Tammy		1	2.00	2.00		39,440.56
12/11/2001		Kolupar, Tammy	Photocopies	1,040	0.15	156.00		39,596.56
12/17/2001		Kolupar, Tammy	conf w pme; discuss ...	0.3	195.00	58.50		39,655.06
12/26/2001		Kolupar, Tammy	Faxes	1	0.50	0.50		39,655.56
12/27/2001		Kolupar, Tammy	Postage	1	2.84	2.84		39,658.40
12/28/2001		Kolupar, Tammy	Photocopies	192	0.15	28.80		39,687.20
12/31/2001	1824	Kolupar, Tammy				8,236.00		47,923.20
01/31/2002		Kolupar, Tammy	Postage	4.11	0.00			47,923.20
02/25/2002		Kolupar, Tammy	Mileage Reimbursem...	19	0.365	6.94		47,930.14
02/25/2002		Kolupar, Tammy		1	2.00	2.00		47,932.14
02/26/2002		Kolupar, Tammy	Photocopies	28	0.15	4.20		47,936.34
02/28/2002		Kolupar, Tammy	conf w pme re strateg...	0.5	145.00	72.50		48,008.84
03/01/2002		Kolupar, Tammy	conf w pme re hearin...	0.4	145.00	58.00		48,066.84
03/31/2002	1825	Kolupar, Tammy				1,145.50		49,212.34
04/09/2002		Kolupar, Tammy	Faxes	14	0.50	7.00		49,219.34
04/12/2002		Kolupar, Tammy	Faxes	1	0.50	0.50		49,219.84
04/23/2002		Kolupar, Tammy	Faxes	3	0.50	1.50		49,221.34
04/24/2002		Kolupar, Tammy	Conference with Atty...	0.2	145.00	29.00		49,250.34
04/25/2002		Kolupar, Tammy	Motion Hearing Tran...		107.25	107.25		49,357.59
04/29/2002		Kolupar, Tammy	transcript-Judge Coo...		10.50	10.50		49,368.09
04/30/2002		Kolupar, Tammy	Conference with Atty...	1	145.00	145.00		49,513.09
05/08/2002	1837	Kolupar, Tammy				3,132.00		52,645.09
05/08/2002		Kolupar, Tammy	Reply Brief preparati...	0.4	145.00	58.00		52,703.09

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
4/10/2000	106

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
5/10/2000

DATE	DESCRIPTION	HOURS	RATE	TOTAL
3/24/2000	Preparation of pleadings	1.9	145.00	275.50
3/27/2000	Preparation of pleadings	1	145.00	145.00
3/28/2000	Legal research; outline summons and complaint	1.4	145.00	203.00
3/29/2000	Preparation of summons and complaint; file at clerk of courts	6.1	145.00	884.50
2/21/2000	Conference with David Lisko; review file materials; legal research on Wisconsin Administrative Code and federal odometer statute	2.4	145.00	348.00

Total $1,856.00

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
1/31/2001	1749

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
1/31/2001

DATE	DESCRIPTION	HOURS	RATE	TOTAL
12/20/2000	Time-legal research computer research, research on West Premise	1.4	145.00	203.00
12/26/2000	Time-review deposition transcript	0.5	145.00	72.50
12/29/2000	Time-review depositions transcript-review document requests-letter from Atty Gutenkunst	0.6	145.00	87.00
1/3/2001	Time-review deposition with Mr. Vanderveldt	1.3	145.00	188.50
1/19/2001	Time-preparation of interrogatories and document requests	1.6	145.00	232.00

Total $783.00

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
2/22/2001	1763

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
2/22/2001

DATE	DESCRIPTION	HOURS	RATE	TOTAL
3/29/2000	Filing Fee		186.00	186.00
6/1/2000	Process Fee		15.00	15.00
8/31/2000	meter		0.85	0.85
8/31/2000	expense reimbursement		5.89	5.89
9/13/2000	Mileage and parking		0.00	0.00
9/13/2000	Mileage		0.00	0.00
12/19/2000	Mileage and parking		0.00	0.00
12/19/2000	Mileage		0.00	0.00
12/22/2000	Transcript of Tammy Kolupar		206.90	206.90
12/28/2000	Vanderveldt Deposition		939.10	939.10
12/29/2000	Mileage and Parking		7.58	7.58
12/29/2000	Mileage		1.60	1.60
12/29/2000	Susan Kolupar Transcript		74.80	74.80
1/24/2001	Transcript Fee		95.20	95.20
2/6/2001	Investigation - Locate Iven Streckel		160.00	160.00
2/6/2001	R. Thompson depo		524.70	524.70
	Total Reimbursable Expenses			2,217.62

Total $2,217.62

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
2/22/2001	1765

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
2/22/2001

DATE	DESCRIPTION	HOURS	RATE	TOTAL
2/21/2000	Conference with David Lisko; review file materials; legal research on Wisconsin Administrative Code and federal odometer statute	2.4	145.00	348.00
3/24/2000	Preparation of pleadings	1.9	145.00	275.50
3/27/2000	Preparation of pleadings	1	145.00	145.00
3/28/2000	Legal research; outline summons and complaint	1.4	145.00	203.00
3/29/2000	Preparation of summons and complaint; file at clerk of courts	6.1	145.00	884.50
4/26/2000	Conference with assistant regarding skip trace on Mr. Thompson	0.5	145.00	72.50
4/27/2000	Follow up with assistant with information from Mr. Kitzke.	0.4	145.00	58.00
5/2/2000	Telephone conference with Attorney Gutenkunst; legal research on change of venue motion.	1.1	145.00	159.50
5/7/2000	Begin preparation of materials in opposition to venue motion.	0.8	145.00	116.00
5/9/2000	Telephone conference with Susan; preparation of brief on venue issue.	2.3	145.00	333.50
5/11/2000	Research on corporate status of Wilde Pontiac and Wilde Toyota.	0.4	145.00	58.00
5/22/2000	Review pleadings.	0.4	145.00	58.00
6/2/2000	Preparation of letter to Judge Malmstadt; legal research.	1.3	145.00	188.50
6/5/2000	Deliver letter to Judge Malmstadt.	0.6	145.00	87.00
6/6/2000	Attend and argue venue motion before Judge Malmstadt.	1.2	145.00	174.00
6/28/2000	Preparation of long letter to Judge Malmstadt regarding venue motion.	1.2	145.00	174.00
6/30/2000	File venue letter in circuit court.	0.3	145.00	43.50
7/8/2000	Calendar scheduling conference date	0.2	145.00	29.00
7/10/2000	Letter to Judge Malmstadt with proof of service	0.2	145.00	29.00
7/11/2000	Letter to Attorney Gutenkunst; notice of deposition with document request	0.6	145.00	87.00
8/2/2000	Telephone conference with Attorney Gutenkunst	0.3	145.00	43.50

Total

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
2/22/2001	1765

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
2/22/2001

DATE	DESCRIPTION	HOURS	RATE	TOTAL
8/3/2000	Prepare for deposition; attend and conduct deposition of Sandy Anderson-Payne	2.3	145.00	333.50
8/8/2000	Travel to Milwaukee County Courthouse; attend Scheduling Conference	1.3	145.00	188.50
8/16/2000	Conference with Tammy and Sue Kolupar; telephone conference with Attorney Sawyer Gutenkunst	3.25	145.00	471.25
8/18/2000	Letter to Attorney Gutenkunst	0.3	145.00	43.50
8/21/2000	Telephone conference with Sue Kolupar	0.3	145.00	43.50
9/15/2000	Conference with Stan Runayn (expert).	0.4	145.00	58.00
9/19/2000	Preparation of motion regarding discovery.	1.1	145.00	159.50
9/21/2000	Review correspondence from Attorney Gutenkunst; conference with Denise Rebholz.	0.4	145.00	58.00
9/25/2000	Appear in Judge Malmstadt's court for motion to compel; travel to courthouse.	1	145.00	145.00
9/26/2000	Prepare order for Judge Malmstadt's signature; letter to Judge Malmstadt; letter to Attorney Gutenkunst; review correspondence.	1.1	145.00	159.50
11/6/2000	Preparation of witness list.	1.2	145.00	174.00
11/13/2000	Review correspondence; telephone conference with Judge Malmstadt's clerk for hearing date.	0.6	145.00	87.00
11/17/2000	Preparation of motion for discovery sanctions; telephone conference with Judge Malmstadt's clerk; telephone conference with Attorney Atinski; review correspondence.	1.1	145.00	159.50
11/17/2000	Preparation of letter to Mr. Atinsky; review correspondence.	0.3	145.00	43.50
11/22/2000	Preparation of materials regarding discovery motion; review brief, motion, affidavit and letter from Attorney Gutenkunst.	2.1	145.00	304.50
11/27/2000	Appearance before Judge Malmstadt on motion for discovery sanctions; conference with David J. Lisko; preparation for motion.	1.9	145.00	275.50

Total

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
2/22/2001	1765

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
2/22/2001

DATE	DESCRIPTION	HOURS	RATE	TOTAL
12/8/2000	Preparation of clients fro deposition; review documents received from defendants.	5	145.00	725.00
12/11/2000	Preparation for depositions of Mr. Vanderveldt and Ms. Kolupar.	5.3	145.00	768.50
12/12/2000	Conduct depositions of Mr. Vanderveldt and Ms. Kolupar; conference with client in preparation of deposition.	7.1	145.00	1,029.50
12/13/2000	Preparation of interrogatories and requests to admit.	0.9	145.00	130.50
12/14/2000	Telephone conference with Judge Malmstadt's clerk; telephone conference with Judge Malmstadt's court reporter; conference with David J. Lisko.	0.8	145.00	116.00
12/15/2000	Research on Mr. Thompson.	0.8	145.00	116.00
12/15/2000	Conference with Judge Malmstadt's clerk.	0.2	145.00	29.00
12/18/2000	Conference with Sue Kolupar; preparation of long letter to Judge Malmstadt.	0.7	145.00	101.50
12/19/2000	Conference with Sue Kolupar; travel to Cramer, Multhauf & Hammes; attend deposition of Sue Kolupar.	2.4	145.00	348.00

Total $9,635.25

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
3/31/2001	1778

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
3/31/2001

DATE	DESCRIPTION	HOURS	RATE	TOTAL
1/22/2001	Letter to Atty. Gutenkunst	0.3	145.00	43.50
2/1/2001	Preparation for Thompson deposition; conference with Atty. Lisko	2.3	145.00	333.50
2/2/2001	Preparation for deposition; conduct deposition of Mr. Thompson; travel	5.8	145.00	841.00
2/6/2001	Check with CCAP re status; review transcript of hearing.	0.7	145.00	101.50
2/7/2001	telephone conference Tammy; Preparation of Requests to Admit; letter to Atty. Gutenkunst	1.9	145.00	275.50
2/8/2001	Preparation of Requests for Admission	1.7	145.00	246.50
2/8/2001	Letter to Judge Malmstadt with modified order; review transcript; review correspondence and proposed order from Atty. Gutenkunst.	1.1	145.00	159.50
2/11/2001	Deposition preparation	0.8	145.00	116.00
2/12/2001	Deposition preparation; conduct depositions of Pat Donahue and Sharon Bloom.	5.2	145.00	754.00
2/13/2001	Telephone Conference with client	0.3	145.00	43.50
2/13/2001	Draft responses to 3rd Requests for Production of Documents and letter to Atty. Gutenkunst.	0.7	145.00	101.50
2/22/2001	Deposition preparation with client and DJL to outline and prepare for Zanella deposition.	1.9	145.00	275.50
2/23/2001	Deposition preparation with client and Atty. Lisko; participate in deposition of Joe Zanella	4.25	145.00	616.25
2/26/2001	Review correspondence- Atty. Gutenkunst; Letter to Atty. Gutenkunst	0.5	145.00	72.50
2/27/2001	Forward interrogatory answers to client; review and modify; preparation of itemization of special damages	1.6	145.00	232.00
3/1/2001	Review transcript of Donahue deposition; review documents received from Wilde; review Randall Thompson deposition; conference with Atty. Lisko.	2.4	145.00	348.00
3/2/2001	Preparation of Motion	0.6	145.00	87.00
3/5/2001	Preparation of Affidavit and Motion	2.7	145.00	391.50
3/6/2001	Preparation of letter brief and letter	3	145.00	435.00

Total

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
3/31/2001	1778

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
3/31/2001

DATE	DESCRIPTION	HOURS	RATE	TOTAL
3/7/2001	Final Preparation of default judgment motion, letter brief and affidavit; select documents; review letter; forward to Judge Crivello, judge Malmstadt, Atty Gutenkunst and Atty Atinsky.	5.4	145.00	783.00
3/13/2001	Telephone conference with Atty. Frank Crivello.	0.4	145.00	58.00

Total $6,314.75

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
5/22/2001	1795

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
5/22/2001

DATE	DESCRIPTION	HOURS	RATE	TOTAL
4/4/2001	Review summary judgment motion from Atty. Gutenkunst, letter	0.7	145.00	101.50
4/4/2001	Legal Research	0.5	145.00	72.50
4/10/2001	Telephone conference with Judge Malmstadt's clerk; Preparation of Findings of Fact and conclusions of law (proposed) for pretrial submissions.	1.3	145.00	188.50
4/12/2001	Preparation of pretrial report.	1.1	145.00	159.50
4/13/2001	Preparation of proposed Findings of Fact Conclusions of Law	2.6	145.00	377.00
4/24/2001	Pretrial report and pleadings from Atty. Gutenkunst, legal research to prep for pretrial	0.9	145.00	130.50
4/25/2001	Appear in Judge Malmstadt's court for pretrial; legal research at law library	2.4	145.00	348.00
4/26/2001	Telephone conference with Reserve Judge Crivello and representatives from Atinsky and Gutenkunst re: rescheduling.	0.6	145.00	87.00
5/1/2001	Law review on statute of limitation issue.	0.6	145.00	87.00
5/1/2001	Telephone with Hon. Will Zick re: mediation dates; letter to other attorneys.	0.6	145.00	87.00
5/2/2001	Legal research; preparation of brief in opposition to summary judgment motion.	1.7	145.00	246.50
5/7/2001	Letter to Judge Malmstadt with exhibit list.	0.4	145.00	58.00
5/10/2001	Legal research	1.4	145.00	203.00
5/11/2001	Preparation of brief	3	145.00	435.00
5/14/2001	Preparation of brief in opposition to summary judgment motion. Legal research; review deposition transcripts	5.6	145.00	812.00
5/15/2001	Legal research; preparation of brief, affidavit of Tammy Kolupar; Affidavit of Atty. Erspamer; and letter to Judge Mamstadt; telephone conferences with Sue Kolupar; telephone conference with Tammy Kolupar	7.4	145.00	1,073.00

Total

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
5/22/2001	1795

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
5/22/2001

DATE	DESCRIPTION	HOURS	RATE	TOTAL
5/16/2001	File brief in opposition with Judge Mamstadt's clerk; conference with clerk; letter of ot Judge Malmstadt ; conference with Atty. Lisko; select deposition pages to send as excerpts	1.3	145.00	188.50

Total $4,654.50

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
6/18/2001	1803

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
6/18/2001

DATE	DESCRIPTION	HOURS	RATE	TOTAL
5/18/2001	Letter to Reserve Judge Crivello with supporting documents	2.6	145.00	377.00
5/23/2001	Review correspondence from Atty. Gutenkunst, review and select file materials, telephone conference with Sue Kolupar	2.6	145.00	377.00
5/24/2001	Draft affidavit; conference with Atty. Lisko to prepare arguments; travel to Frank Crivello's office; Hearing on discovery motions; conference with Tammy Kolupar	5.8	145.00	841.00
5/25/2001	Internet research to locate witness; review documents from client; telephone conferences with Tammy and Susan Kolupar. Conference with d.r. re: register of deeds.	1.5	145.00	217.50
5/30/2001	Travel to Milwaukee County Courthouse; Obtain documents from clerk of Circuit Court.	1.2	145.00	174.00
5/31/2001	Respond to letter from Ms. Gutenkunst;	0.7	145.00	101.50
6/1/2001	Obtain records at register of deeds.	1.1	145.00	159.50
6/5/2001	Preparation of Amended document list; Attn: to file re: contact with contact with investigator.	0.9	145.00	130.50
6/6/2001	Review document disclosure; forward with letter to Judge Mamstadt; telephone conference with client; review correspondence from Ms. Gutenkunst.	1	145.00	145.00
6/6/2001	Telephone conference with Sue Kolupar		145.00	145.00
6/11/2001	Telephone conference with Sue Kolupar	0.3	145.00	43.50
6/12/2001	Begin preparation for summary judgement hearing; review briefs, affidavits and deposition transcripts.	2.1	145.00	304.50
6/13/2001	Travel to Milwaukee Co. Courthouse; conduct summary judgment hearing before Judge Malmstadt	1.6	145.00	232.00

Total $3,248.00

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
7/24/2001	1805

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
7/24/2001

DATE	DESCRIPTION	HOURS	RATE	TOTAL
6/11/2001	Telephone conference to Scott of Hawk	0.2	145.00	29.00
6/12/2001	Telephone with client.	0.3	145.00	43.50
6/14/2001	Review correspondence from Atty. Gutenkunst, conference with Atty. Lisko, telephone conference to Hawk Unlimited, letter to Ms. Gutenkuns, telephone conference with Mr. Kurczewski, letter to Mr. Kurczewski, conference with Mr. Kurczewski..	2.1	145.00	304.50
6/15/2001	telephone conference with Sue Kolupar, telephone conference with Sue Kolupar, telephone conference with client, preparation of amended witness list, preparation of amended itemization of special damages, letter to Ms. Gutenkunst re: Amy Mueller deposition.	2.4	145.00	348.00
6/25/2001	Telephone conference with Susan Kolupar, letter to Atty Gutenkunst, conference with Atty. Lisko, review correspondence from Ms. Gutenkunst,	1.1	145.00	159.50
6/27/2001	Letter to Ms. Gutenkunst.	0.3	145.00	43.50
6/29/2001	Modify letter; telephone conference with Mr. Kurczevski/	0.5	145.00	72.50
7/2/2001	Telephone conference with client, contact Ms. Amy Huber.	0.7	145.00	101.50
7/5/2001	telephone conference with Tammy Kolupar, telephone conference with Ms. Amy Huber, preparation of subpoena and Notice of Deposition., attention to file re: process server and court reporter.	1.5	145.00	217.50
7/6/2001	Telephone conference with Ms. Huber, preparation of outline for deposition.	1.4	145.00	203.00
7/9/2001	Preparation for deposition; conduct deposition of Amy Mueller Huber, conference with DJL.	1.9	145.00	275.50
7/10/2001	Review correspondence and proposed order, draft letter to Frnak Crivello.	0.6	145.00	87.00
7/11/2001	Letter to Ms. Gutenkunst re:order, letter to Ms Gutenkunst re: deposition of of used car manager.	0.6	145.00	87.00
7/12/2001	Letter to Frank Holland	0.3	145.00	43.50

Total

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
7/24/2001	1805

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
7/24/2001

DATE	DESCRIPTION	HOURS	RATE	TOTAL
7/13/2001	Conference with staff at Halm-Jilek to obtain hearing transcript.	0.5	145.00	72.50
7/17/2001	Preparation for hearing before special referee Frank Crivello; attend and participate at hearing.	2.6	145.00	377.00
7/19/2001	Preparation of mediation summary	0.3	145.00	43.50
7/20/2001	Review correspondence and proposed order	0.3	145.00	43.50
7/23/2001	Telephone conference with client, letter to Judge Crivello, preparation of Response to Wilde's 4th set of document requests; review documents and select.	2	145.00	290.00

Total $2,842.00

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
12/31/2001	1824

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
12/5/2001

DATE	DESCRIPTION	HOURS	RATE	TOTAL
7/24/2001	Preparation of mediation summary and final preparation of responses to 4th set of document requests	3.1	145.00	449.50
7/25/2001	Preparation of mediation summary-select deposition transcripts and exhibits-review and modify-deliver to Judge Zick	4.6	145.00	667.00
7/26/2001	Draft letter to Judge Crivello-review transcript; forward mediation summary to Atty. Gutenkunst and Atinsky	2.2	145.00	319.00
7/27/2001	Conference with Tammy and Sue Kolupar; travel to Kramer office; participate in mediation with Judge Willis Zick; preparation of subpoenas and notices of deposition re: Jamey Gleason	4.7	145.00	681.50
7/30/2001	Amend notices of depositions re: Dexter White and Jamey Robbins, telephone conference with Jamey Robbins; review case file at courthouse ; conference with Mr. Danielson, process server	2.6	145.00	377.00
7/31/2001	Preparation for deposition; deposition for Mr. Dexter White; preparation for deposition and conduct deposition of Ms. Robbins; telephone with client	3.6	145.00	522.00
8/1/2001	Telephone conference with Sue Kolupar; telephone conference with Tammy Kolupar; review correspondence and new proposed order from Atty. Gutenkunst.	0.9	145.00	130.50
8/6/2001	Letter to Mr. Crivello	0.4	145.00	58.00
8/9/2001	Preparation of subpoena and notice of deposition re: Brad Braun	0.5	145.00	72.50
8/9/2001	Telephone conference to Mr. Braun; telephone conference with Mr. Baisden; telephone conference with process server	0.9	145.00	130.50
8/10/2001	Letter to Judge Crivello; letter to Atty. Gutenkunst; telephone conference with Atty. Habeck; preparation of amended Notice of Deposition of Mr. Braun with letter to counsel; telephone conference with Mr. Braun; travel to Griffin Ford; conduct deposition of Mr. Braun; conference with Atty. Lisko	4.8	145.00	696.00

Total

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
12/31/2001	1824

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
12/5/2001

DATE	DESCRIPTION	HOURS	RATE	TOTAL
8/13/2001	Participate in telephonic conference with Judge Crivello and Atty. Gutenkunst; conference with Atty. Lisko	0.7	145.00	101.50
8/16/2001	Preparation for hearing; travel to Atty. Crivello's office; attend hearing	2.6	145.00	377.00
8/17/2001	Letter to Atty. Crivello	0.3	145.00	43.50
8/28/2001	Letter re: Atty. Gutenkunst's proposed order; letter re: source of Florida DOT documents; telephone conference with Sue Kolupar	0.8	145.00	116.00
9/10/2001	Telephone conference with Sue Kolupar; Letter to Mr. Crivello	0.6	145.00	87.00
9/11/2001	Travel to Milwaukee Courty Courthouse for pretrial; reveiw correspondence and documents from Atty. Gutenkunst; memo re: calendar pretrial; schedule continued mediation.	2.1	145.00	304.50
9/13/2001	Telephone conference with Judge Zick, Atty. Gutenkunst and Atty. Atinsky's office to schedule mediation.	0.4	145.00	58.00
9/28/2001	Review letter; order and invoice from Judge Crivello	0.3	145.00	43.50
9/14/2001	Letter to Mr. Crivello	0.3	145.00	43.50
11/9/2001	Telephone conference with Atty. Crivello	0.3	145.00	43.50
11/29/2001	Outline witness testimony	1.1	145.00	159.50
11/12/2001	Letter on damages and remedies; letter on Florida; emissions regulations	2.6	145.00	377.00
11/21/2001	Preparation of updated mediation summary letter for Judge Zick; conference with Atty. Lisko; review deposition transcript	1.8	145.00	261.00
11/26/2001	Telephone conference with Tammy; telephone conference with Sue; select and photocopy deposition transcripts; preparation of updated mediation summary; deliver to Judge Zick with deposition transcript.	2.1	145.00	304.50
11/27/2001	Travel to Cramer Law Office; participate in mediation with Reserve Judge Willis Zick	4	145.00	580.00
11/28/2001	Preparation of offer of settlement; conference with Atty. Lisko; begin to outline testimony	1.3	145.00	188.50

Total

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
12/31/2001	1824

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
12/5/2001

DATE	DESCRIPTION	HOURS	RATE	TOTAL
12/5/2001	Attend pretrial before Judge Cooper; travel to courthouse	1.4	145.00	203.00
12/6/2001	Telephone conference with Judge Zick; conference with Atty. Lisko	0.5	145.00	72.50
12/12/2001	Telephone conference with Judge Cooper's clerk; review correspondence	0.4	145.00	58.00
12/26/2001	Final reveiw and modifications of letter with attachments to Judge Coper	0.4	145.00	58.00
12/27/2001	Telephone conference with Tammy re: settlement offer	0.3	145.00	43.50
12/14/2001	Review correspondence from Atty. Gutenkunst and offers of judgment; extensive review of statute re: offer	1.1	145.00	159.50
12/17/2001	Telephone conference with Atty. Crivello	0.3	145.00	43.50
12/21/2001	Letter to Judge Cooper; telephone conference with scheduling clerk; preparation of default motion.	2.8	145.00	406.00

Total $8,236.00

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
3/31/2002	1825

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
2/26/2002

DATE	DESCRIPTION	HOURS	RATE	TOTAL
1/4/2002	Conference with Judge Cooper's clerk to schedule default judgment motion; preparation of default motion.	0.3	145.00	43.50
1/11/2002	Preparation of motion and affidavit in support of default as to Randall Thompson	1.1	145.00	159.50
2/22/2002	Preparation for hearing	0.5	145.00	72.50
2/24/2002	Preparation for hearing outline argument	0.6	145.00	87.00
2/25/2002	Travel to Milwaukee Co. Courthouse; conference with Tammy; argue motion before Judge Thomas Cooper; Review schedule order and motion pleadings-additional preparation	2	145.00	290.00
2/28/2002	Conference with Atty. Lisko; re: proof needed (witnesses and documents for 05/13/02 hearing.)	0.7	145.00	101.50
3/1/2002	Conference with Atty. Lisko re: resolving remaining issues in case	0.7	145.00	101.50
3/4/2002	Telephone conference with client; telephone conference to Atty. Kobriger; telephone conference client; Telephone conference with Judge Cooper's clerk; Letter to Mr. Kobriger.	1.5	145.00	217.50
3/8/2002	Telephone conference with Judge Malmstadt's clerk; telephone conference with Court-Admin. Office	0.5	145.00	72.50

Total $1,145.50

LISKO & ERSPAMER, S.C.

SUNSET PLAZA, SUITE 201
W229 N1433 WESTWOOD DRIVE
WAUKESHA, WI 53186-1183

Invoice

DATE	INVOICE #
5/8/2002	1837

TO:

Tammy Kolupar
c/o Sue Kolupar
1225 S. 93rd Street
West Allis, WI 53214

DUE DATE
5/8/2002

DATE	DESCRIPTION	HOURS	RATE	TOTAL
4/8/2002	Preparation of letter, document request and proposed order. Letter to client	0.9	145.00	130.50
4/9/2002	Review and revise letter to Judge Cooper, proposed default order, and document request	0.4	145.00	58.00
4/16/2002	Letter to Judge Cooper	0.3	145.00	43.50
4/22/2002	Long telephone with Atty. Towers; memo, Telephone conference to Atty. Towers	0.7	145.00	101.50
4/23/2002	Review correspondence from Atty. Atinsky and Atty. Gutenkunst; reivew clerk's minutes from 2/25/02 hearing from CCAP	0.7	145.00	101.50
4/24/2002	Telephone conference with Judge Cooper's court reporter; telephone conference to Judge Malmstadt's reporter. Conference with Atty. Lisko.	0.8	145.00	116.00
4/25/2002	Telephone conference with Atty. Larry Towers; Research on remedies; reveiw hearing transcript.	0.4	145.00	58.00
4/29/2002	Telephone conference with client.	0.3	145.00	43.50
4/30/2002	Conference with Atty. Towers-started outline of brief, letter to Atty. Kobriger	3.7	145.00	536.50
5/1/2002	Telephone conference with Atty. Towers; reveiw draft of affidavit	0.6	145.00	87.00
5/6/2002	Prep. of petition	2.3	145.00	333.50
5/7/2002	Prep. of brief	1.1	145.00	159.50
5/8/2002	Prep. of brief	4.3	145.00	623.50
5/9/2002	Briefing	5.1	145.00	739.50

Total **$3,132.00**

APPENDIX 19

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

TAMMY KOLUPAR,

Plaintiff,

vs.

Case No. 00-CV-2571
Case Code: 30703

WILDE PONTIAC, CADILLAC, INC.
and RANDALL THOMPSON,

Defendants.

AFFIDAVIT OF LAURA MARTINCO

STATE OF WISCONSIN)
)ss
WAUKESHA COUNTY)

LAURA MARTINCO, being first duly sworn, deposes and states:

1. That I am employed by Lisko & Erspamer, S.C as a bookkeeper.

2. That I am responsible for financial records and billing records of Lisko & Erspamer, S.C.

3. That attached hereto is a true and accurate copy of the billing filed with the Court and served upon defense counsel during the week before the May 13-14, 2002 bench trial.

4. That after Attorney Gutenkunst (representing defendant, Wilde

Pontiac) asserted that said statement contained duplicate billings, I was asked to review said statement .

5. That I performed a reconciliation of said statement as follows:

	Statement Balance		52,703.09
FEES	Invoice # 1749	783.00	
	Invoice # 1765	9,635.25	
	Invoice # 1778	6,314.75	
	Invoice # 1795	4,654.50	
	Invoice # 1803	3,248.00	
	Invoice # 1805	2,842.00	
	Invoice # 1824	8,236.00	
	Invoice# 1825	1,145.50	
	Invoice# 1837	3,132.00	
	Statement charges	851.50	
	TOTAL FEES:		40842.50
COSTS			
	Invoice # 1763	2,217.62	
	Statement charges	8,456.00	
	TOTAL COSTS:		10,673.62
	Duplicate Invoice (#106) (Not included in fees or costs)		1,856.00
	Hourly rate billed at $195.00, should be $145.00: Difference of $165.00) (11/26/01, 11/28/01, 12/26/01 DJL)		165.00
	PAYMENTS:		
	Client payments		(834.03)

6. That the correct amount owed for attorneys fees as demonstrated by said reconciliation is $40842.50.

7. That the correct amount owed for litigation expenses as

demonstrated by said reconciliation is $10,673.62.

Dated at Waukesha, Wisconsin, this 21st day of June, 2002

Laura Martinco

Laura Martinco

Subscribed and sworn to before me
this 21st day of June, 2002.

Notary Public, State of Wisconsin
My Commission: 1 5 Dec 04

APPENDIX 20

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNT

Tammy Kolupar, Plaintiff(s),

vs.

Wilde Pontiac Cadillac Inc, Defendant(s).

CIVIL DIVISION SCHEDULING ORDE

CASE # 00CV002571

Pursuant to §802.10(3) & 802.11 Wis. Stats. and on the Court's own motion, IT IS HEREBY ORDERED:

1. The naming of additional parties and any amendments to the pleadings shall be completed on or bef 9-8-00. A copy of this Order shall be served with a copy of the complaint on any additional party.

2. Counsel shall provide in writing to opposing counsel: (1) the name and addresses of lay witnesses (with a b statement as to their testimony); (2) the names, addresses, and resumes together with a written report for each exp named; and (3) an itemized statement of damages claimed, including any special damage claims and permanency, or before 11-8-00 by Plaintiff 12-8-00 by Defendant _____ by Third Pa

Witnesses not timely named and described shall not be called as witnesses at trial, except for good cause shown.

3. All dispositive pretrial motions shall be **filed** on or before 2-8-01 and s be accompanied by affidavits and/or legal memoranda in compliance with **Local Rules #364 & 366**. Any other pre motion as to which the movant can reasonably expect an opposing party to have a differing view must also be suppor by a memorandum of law with the authorities on which the movant relies, along with a brief statement of the facts compliance with **Local Rules #365 & #366**.

4. All discovery (**except** depositions for use at trial) shall be completed by 2-8-01 **Any motion to compel discovery not accompanied by the statement required by Local Rule #343 shall not heard.**

5. ADR:

☒ A. On or before _____, the parties shall discuss the advisability of ADR and if the pa agree on a method, the plaintiff shall so advise the court in writing. If the parties do not agree, each party must file a l stating a position on ADR, including any reasons why ADR is not appropriate. Upon receipt of said information, the c will order the ADR method agreed upon; if no agreement is reached, the court may order an ADR method (**§802.12**).

☐ B. The parties shall complete mediation no later than 3-8-01, w ~~mediator agreed to by the parties~~, or Willis Zick shall serve as mediator pursua §802.12, Wis. Stats. The parties shall share equally the cost of the service provider's fee. The parties and their attor shall be present and participate in the mediation, with each corporate party represented by an individual with the auth to negotiate a resolution in this matter. In the event either party appears at the mediation without full authority to nego a resolution, the party may be ordered to pay **all** costs of the mediation.

6. A pretrial conference is set on 4-25-01 at 900. Counsel will actually try the case must be present. The client must also appear unless counsel has full authority to act or the c is readily available by phone.

7. Pretrial Report: On or before 4-18-01 each party shall prepare and file with the co pretrial report. The report must be signed by the attorney who will try the case (or a party personally, if not represe by counsel).

EXHIBIT A

Octo

CIVIL DIVISION SCHEDULING ORDER

CASE NO. 00CV0025

The Pretrial Report must include the following:

A. A detailed summary of the facts of the case, issues and theories of liability or defense and evidentiary issues. The summary should not be longer than two pages.
B. The identification of each trial witness and a specific summary (not exceeding one page per witness) of the testimony of each witness (lay and expert).
C. A list of exhibits to be offered at trial. Plaintiff shall designate its exhibits using the numbers #1-100; Defendant shall use the numbers #101-200. The exhibits shall be marked and made available for inspection upon the request of any other party as of the filing of the Exhibit List. Exhibits not timely listed and made available for inspection shall not be used at trial, except for good cause shown.
D. A designation of all depositions or portions of depositions to be read into the record at trial as substantive evidence.
E. **Jury trials**–If a jury trial has been requested; (a) all proposed jury instructions [numbers only, unless requesting modified or special instructions] (b) proposed verdict form (c) all motions in limine. [The proposed verdict form and any modified or special instructions shall also be submitted on a 3.5" computer disk in WordPerfect 5.1 or ASCII format.]
F. **Court trial**–If a court trial has been requested, proposed Findings of Fact and Conclusions of law.
G. In addition to completing a report, counsel are expected to confer and make good faith effort to settle the case. Counsel are also expected to arrive at stipulations that will save time during the trial. The Pretrial Report shall itemize any stipulations.

Sanctions, which may include the dismissal of claims and defenses, may be imposed if a pretrial report is not filed.

8. Jury fees must be paid in accordance with **Local Rule #371** or the jury shall be deemed waived. Trial shall be scheduled at the pretrial conference.

9. No stipulations to an extension of time limits in this order will be permitted without consent of the court.

10. OTHER ORDERS:

Tr waives jury - A has 30 days to pay jury fe

FAILURE TO COMPLY WITH THE TERMS OF THIS ORDER SHALL BE CONSIDERED CAUSE FOR IMPOSING SANCTIONS WHICH MAY INCLUDE THE DISMISSAL OF CLAIMS AND DEFENSES. See §804.12 and 805.03 Wis. Stats.

Dated: 8-8-00

BY THE COURT:

Circuit Judge
Branch 39

APPENDIX 21

JASTROCH & LABARGE, S.C.

A PROFESSIONAL SERVICE CORPORATION

ATTORNEYS AT LAW
P.O. BOX 1487
FREEDOM SQUARE
640 W. MORELAND BLVD.
WAUKESHA, WISCONSIN 53187-1487

PHONE 414-547-2611

TELECOPIER 414-547-6195

LEONARD A. JASTROCH
GERALD L. LABARGE

BRADLEY J. BLOCH
ALAN T. TARNOWSKI
WILLIAM S. POCAN
RANDALL M. ARONSON
DAVID J. LISKO
VINCENT P. MEGNA
PAUL M. ERSPAMER
KAREN M. APPEL
DOUGLAS C. GOEB

ATTORNEY
PAUL M. ERSPAMER

June 14, 1995

General Manager
Wilde Pontiac of Waukesha
1603 East Moreland Boulevard
Waukesha, Wisconsin 53186

Re: Tammy Kolupar Transaction Involving Randy Thompson
Date of Sale: March 28, 1994
Our File No. 37 862

Dear Sir:

This office represents Tammy Kolupar, who first purchased an automobile from your dealership, a 1993 Pontiac Sunbird, in 1993. In March of 1994, your then Sales Manager, Randy Thompson, suggested that she trade in the Pontiac Sunbird for a 1985 Mercedes Benz 19E 4-door. Mr. Thompson indicated that Wilde Pontiac was "just getting the Mercedes on the lot."

Ms. Kolupar agreed to the trade-in arrangement suggested by Mr. Thompson, brought in her Pontiac Sunbird to your dealership and picked up the Mercedes Benz at your lot on March 30, 1994. She did not receive the title at the time she picked up the vehicle and, in fact, did not receive the title until approximately April 4, 1994.

When she received the title, she saw that the vehicle had been titled in the name of Mr. Thompson, and in fact did not appear to be a vehicle owned by Wilde Pontiac at the time of the sale.

Shortly thereafter, the odometer on the vehicle stopped functioning. She also developed problems with the transmission, brakes, an axle which she was told had previously been bent, and non-functioning power windows. She had to undergo substantial repair expenses at Berndt Classic Imports and spent hundreds of dollars attempting to repair the vehicle. Despite this, she was unable to get the vehicle to a point where it functioned reliably for her, which caused her to ultimately give up and sell the vehicle for $2,000.00.

Ms. Kolupar reports that the Mercedes which she obtained from your lot on March 30, 1994 had a non-functioning speedometer, which was not disclosed to her on the Certificate of Title, in violation of Wisconsin and Federal law. In particular, 15 U.S.C., Sections 1986, 1988 and 1989 provide for triple damages for a person harmed through a failure to provide an accurate odometer statement.

In addition, Ms. Kolupar was not provided with the vehicle disclosure, which is required by Section Trans. 139.04 in the Wisconsin Administrative Code. As you know, Section Trans. 139.04(6) requires a used motor vehicle label, which must appear on the car, to state that the vehicle is used and the prior use must be clearly and specifically disclosed. As you also know, Section Trans. 139.04(4) requires disclosure, on a label to appear on the car, of the results of a "walk-around" and interior inspection, under-hood inspection, under-vehicle inspection and a test-drive.

None of this information was disclosed to Ms. Kolupar before her trade-in transaction in which she gave up her Pontiac Sunbird in exchange for the 1985 Mercedes.

Finally, the title she finally obtained on or about April 4, 1994 disclosed that the vehicle was not owned by Wilde Pontiac, but instead owned individually by Mr. Thompson. Of course, Mr. Thompson had told her that she was purchasing the vehicle from Wilde Pontiac. Mr. Thompson was a sales manager at Wilde Pontiac at the time and his statements to her were untruthful and fraudulent. His statements were made with the intention of inducing Ms. Kolupar to enter into the transaction because he wished to bring about a transaction with her Pontiac Sunbird and he wished to have an opportunity to unload his Mercedes, which had obviously given him mechanical trouble. His untruthful and fraudulent statements to her, while employed as a sales manager at Wilde Pontiac, constitute a violation of the Wisconsin statute which prohibits fraudulent misrepresentations in commercial transactions. That statute, Section 100.18, prohibits any person, corporation or their employee from making untrue, deceptive or misleading statements or representations in connection with commercial sales to the public.

Mr. Thompson's actions in selling a motor vehicle owned by him at the Wilde Pontiac dealership premises also constitutes a violation of Section 100.18(5) of the Wisconsin Statutes, since the sale at the Wilde Pontiac lot constituted an untrue representation that the motor vehicle was owned by Wilde Pontiac (which would suggest that Ms. Kolupar would have remedies against Wilde Pontiac rather than against Mr. Thompson, personally).

The bottom line here is that a very serious consumer fraud was worked against Ms. Kolupar by Randy Thompson, your sales manager. His actions reflect directly upon Wilde Pontiac. Consequently, Ms. Kolupar purchased a motor vehicle which had severe and substantial mechanical problems, for a price of $10,300.00.

Mr. Thompson arranged for Ms. Kolupar's financing at the Waukesha State Bank, utilizing the assistance of his girlfriend, who was a bank employee and apparently an assistant loan officer.

In any event, Ms. Kolupar now faces litigation commenced by the bank to collect the balance on the loan. Her damages consist of her $2,000.00 down payment, approximately $1,800.00 made in car payments and for repairs, and a balance of approximately $9,200.00 still owed to the Waukesha State Bank, for a total of $13,000.00.

Tammy Kolupar was 18 years old at the time of this transaction. It is clear that your employee, Mr. Thompson, took advantage of her and violated several provisions in both the Wisconsin and Federal Consumer laws.

The purpose of this letter is to advise you that we represent Tammy Kolupar and that we are prepared to negotiate a resolution of her claim against Wilde Pontiac within the next 15 days, or file a lawsuit against you in Waukesha County Circuit Court, alleging the above consumer-referenced violations of State and Federal law. If it is necessary to resort to a lawsuit, we will seek actual attorneys' fees as allowed under the Federal Odometer Fraud Statute, as well as under the Wisconsin Statute (Section 100.18), together with triple damages (under the Odometer fraud statute). Ms. Kolupar also has remedies under sec. 218.01(9)(b) of our statutes, which relates to the rules governing motor vehicle dealerships.

I know that in earlier communications (before my involvement), Wilde Pontiac has taken the position that the Mercedes sale was a private matter between Mr. Thompson and Ms. Kolupar. In this regard, I direct your attention to the fact that Mr. Thompson represented that the Pontiac-for-Mercedes deal was a "trade-in." I also direct your attention to sec. 100.18(5), which was violated in that Mr. Thompson delivered the Mercedes to Tammy Kolupar on your lot, with "Wilde Pontiac" signs visible everywhere. Finally, I address your attention to the attached "F & I - DEAL WORKSHEET" document prepared by Mr. Thompson on a computer, apparently at your dealership, and given to Tammy Kolupar to show her the financing terms. Mr. Thompson clearly represented to Tammy Kolupar that she was dealing directly with Wilde Pontiac.

I will leave it to you to assess the damage to Wilde Pontiac's goodwill and credibility when the local news media learns of a transaction in which an 18 year old is swindled by your sales manager who tells her she is buying a trade-in vehicle from your dealership, but leaves her with his own 9-year old, high-mileage sports car with defective brakes, a bent axle and an inoperative odometer.

I invite your response to this demand letter. Ms. Kolupar indicates that she is willing to settle, during the next 15 days, for her single damages of $13,000 (which includes the sum the Waukesha State Bank is seeking to collect from her). Should you choose not to accept her offer, we will seek the statutory triple damages plus actual attorneys' fees through the litigation process.

Should you choose to ignore this letter, your next communication from us will be a Summons and Complaint filed in Waukesha County Circuit Court.

Thank you for your attention to this matter.

Sincerely,

JASTROCH & LABARGE, S.C.

Paul M Erspamer

PAUL M. ERSPAMER

PME/sb

cc: Tammy Kolupar

APPENDIX 22

CRAMER, MULTHAUF & HAMMES
ATTORNEYS AT LAW

KATHRYN SAWYER GUTENKUNST

SUITE 200
1601 EAST RACINE AVENUE
POST OFFICE BOX 558
WAUKESHA, WISCONSIN 53187
TELEPHONE (414) 542-4278
TELECOPIER (414) 542-4270

July 6, 1995

Paul M. Erspamer, Esq.
Jastroch & LaBarge, S.C.
P.O. Box 1487
Freedom Square
640 W. Moreland Blvd.
Waukesha, WI 53187-1487

Re: Tammy Kolupar transaction involving Randy Thompson
Date of Sale: March 28, 1994
Your File No.: 37 862

Dear Mr. Erspamer:

This office represents Wilde Pontiac, Cadillac, Inc.

Your recent correspondence of June 14, 1995 has been turned over to our attention.

Any transaction between Mr. Thompson and your client relating to a 1985 Mercedes Benz 19E was outside the scope of Mr. Thompson's employment at Wilde.

At no time did Wilde have any ownership interest in the Mercedes Benz which you claim your client purchased, nor did we ever place that vehicle on our lot for sale.

In addition, as you note in your correspondence of June 14, 1995, the title which your client received indicated that the vehicle was owned individually by Mr. Thompson rather than Wilde.

Secondly, we have no record of your client ever paying to Wilde any sums of money for the purchase of the 1985 Mercedes Benz 19E.

Any representations which Mr. Thompson may have made to Ms. Kolupar were made in his individual capacity and outside the scope of this employment at Wilde Pontiac, Cadillac, Inc.

Your reference to Wisconsin Statute §100.18 is misplaced as Wilde did not undertake or initiate any fraudulent representations to induce your client to purchase a vehicle which it did not own and did not receive benefit from.

Secondly, you make reference to §718.01(9)(b) of the Wisconsin Statutes. No such section exists.

I am assuming that you are referring to Chapter 218 of the Wisconsin Statutes which does in fact govern the actions of automobile dealerships.

Again, I would point out that Wilde had no role in the transaction between Mr. Thompson and your client as it relates to the purchase of the 1985 Mercedes Benz 19E.

The only files which Wilde has within its possession with regard to your client is the purchase of a 1993 Pontiac Sunbird on April 4, 1994 at which time a lien was satisfied to M&I Wauwatosa State Bank in the sum of $10,675.96 for your client's benefit.

I trust that this will terminate your threats and accusations against Wilde Pontiac, Cadillac, Inc.

If there is any further correspondence necessary with regard to Ms. Kolupar, please send it to my attention directly.

Very truly yours,

Kathryn S. Gutenkunst

Kathryn Sawyer Gutenkunst

KSG:jk ✓
cc: Ms. Sharon Bloom
Mr. Patrick Donahue

SUPREME COURT OF WISCONSIN
COURT OF APPEALS - DISTRICT I
Appeal No. 02-1915
Circuit Court Case No. 00-CV-2571

TAMMY KOLUPAR,

Plaintiff-Appellant-Petitioner,

v.

WILDE PONTIAC, CADILLAC, INC.
and RANDALL THOMPSON,

Defendants-Respondents.

ON APPEAL FROM THE CIRCUIT COURT
OF MILWAUKEE COUNTY
HONORABLE THOMAS R. COOPER, PRESIDING

RESPONSE BRIEF OF DEFENDANT-RESPONDENT, WILDE PONTIAC, CADILLAC, INC.

CRAMER, MULTHAUF & HAMMES, LLP
Attorneys for Defendants-Respondents, Wilde Pontiac, Cadillac, Inc.
By: Attorney James W. Hammes
State Bar Number 01016120
Attorney Kathryn Sawyer Gutenkunst
State Bar Number 01000329
1601 East Racine Avenue, Suite 200
P.O. Box 558
Waukesha, WI 53187-0558
Phone: 262-542-4278

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Wisconsin Statutes

Other Authorities

STATEMENT OF CASE

A. Nature of the Dispute.

Tammy Kolupar (hereinafter referred to as "Kolupar") purchased a 1993 Pontiac Sunbird (hereinafter referred to as "the Sunbird") from Wilde Pontiac Cadillac, Inc. (hereinafter referred to as "Wilde") in June, 1993. (R. Doc. 58, p. 5) Kolupar dealt with Randall Thompson (hereinafter referred to as "Thompson") who was employed by Wilde as Wilde's new car manager.

Subsequent to Kolupar's purchase of the Sunbird, Thompson and Kolupar began a personal relationship. (R. Doc. 58, pp. 5-7) In March, 1994, Kolupar contacted Thompson and advised Thompson that she had been in an accident with the Sunbird, and that she wanted to purchase a different car. (R. Doc. 58, p.6) Thompson advised Kolupar that he owned a Mercedes Benz (hereinafter referred to as "the Mercedes") which Kolupar might be interested in purchasing. (R. Doc. 58, p.7) Thompson had purchased the Mercedes from Wilde in October, 1993. (R. Doc. 66, p.5)

On March 30, 1994, Kolupar met Thompson in the parking lot of the Wilde dealership. (R. Doc. 58, p.14); (R.

Doc. 64) After examining the Mercedes, Kolupar left her damaged Sunbird at the dealership and left the premises with Thompson's Mercedes. (R. Doc. 58, p.8) Thompson, in turn, agreed to try to work out a financing arrangement which would involve the sale of Kolupar's Sunbird to Wilde to pay off Kolupar's existing debt on the Sunbird and borrowing new funds from an independent bank to pay Thompson for the purchase price of his Mercedes. (R. Doc. 58, pp. 8-9)

Despite the fact that Thompson was selling his personal vehicle, Thompson used Wilde's computer to print out a financial worksheet for Kolupar. (R. Doc. 58; p. 13) Thompson also filled out a credit application for Kolupar and sent the application to Waukesha State Bank, in an effort to secure her financing. (R. Doc. 58, p. 10)

On or about March 31, 1994, Kolupar went to Waukesha State Bank and signed loan documents to obtain the funds needed to purchase Thompson's Mercedes. (R. Doc. 58, p.18) The bank then issued a check to Thompson in the amount of $8,600.00. (R. Doc. 58, pp. 3,18,34; R.-App.-101)

In June, 1995, Wilde received a letter from an attorney representing Kolupar. (R. Doc. 104, Ex. A;

R.-App.-102) In this correspondence, Kolupar's attorney contended that Kolupar had purchased the Mercedes from Wilde and demanded damages because the Mercedes was not in the condition Thompson had represented it to be at the time of the sale. Kolupar's attorney demanded Wilde pay Kolupar $13,000.00 for damages, interest, attorneys fees, and litigation expenses. (R. Doc. 104, Ex. A; R-App.-102)

On July 6, 1995, Wilde responded to the letter received from Kolupar's attorney. In its correspondence, Wilde advised Kolupar's attorney that the dealership did not own, and was not involved in the sale of, Thompson's 1985 Mercedes to Kolupar. Wilde advised Kolupar's attorney that any personal transaction between Thompson and Kolupar was not within the scope of Thompson's employment at Wilde. (R. Doc. 104, Ex. B; R-App.-106)

Nothing further transpired for nearly five years. On March 29, 2000, just prior to the expiration of the statute of limitations, Kolupar filed suit in the Circuit Court of Milwaukee County. Both Wilde and Thompson were named as Defendants. Kolupar's complaint alleged fraud, violation of Federal and state

statutes, and breach of expressed and implied warranties relating to the purchase of Thompson's 1985 Mercedes. (R. Doc. 1)

Wilde answered the complaint and again asserted that the transaction between Kolupar and Thompson was a personal transaction and did not involve the Wilde dealership. (R. Doc. 7) Thompson had left his employment with Wilde shortly after the transaction in which he sold his Mercedes to Kolupar and, at the time of the filing of the complaint, resided in South Carolina. (R. Doc. 16) Thompson retained an attorney to represent him in the proceeding. (R. Doc. 20)

B. Discovery Issues.

After the filing of the complaint, Kolupar and Wilde began discovery, including the taking of depositions and the serving of interrogatories and demands for production of documents.

On September 25, 2000, the court heard Plaintiff's motion to compel discovery. The order resulting from the September 25, 2000 hearing was signed by Judge Michael Malmstadt on October 13, 2000. (R. Doc. 27; R-App.-108)

On November 27, 2000, the court heard and considered motions filed by Kolupar and Wilde wherein both

parties sought to impose sanctions based on failure to comply with the October 13, 2000 order. (R. Doc. 125) On February 14, 2001, Judge Michael Malmstadt signed an order arising from the November 27, 2000 hearing disposing of the parties' motions, and ordered that ". . .any further discovery disputes between the parties will be heard and decided by a Special Master who will be retired Circuit Judge, Honorable Frank T. Crivello." (R. Doc. 50; R.-App.-110)

Subsequent to the November 27, 2000 hearing, both Kolupar and Wilde filed various discovery motions with the court which were then referred to Judge Crivello. As a result of the filing of those motions, Judge Crivello conducted hearings on May 24, 2001, July 17, 2001, and August 16, 2001. (R. Doc. 133; R. Doc. 134; R. Doc. 135) As a result of the above-referenced hearings before Judge Crivello, orders were issued on July 17, 2001 (R. Doc. 75; R-App.-112), August 16, 2001 (R. Doc. 81; R-App.-114), and September 24, 2001 (R. Doc. 84; R-App.-118)

Although Judge Crivello resolved the disputes, the procedure was time consuming. For example, the May 24, 2001 hearing lasted nearly two hours. (R. Doc. 133)

The hearings were also contentious. For example, a portion of the transcript of the July 17, 2001 hearing reflects the following exchange between counsel for Kolupar and Judge Crivello:

> MR. ERSPAMER: I was present at the hearing. I was taking notes at the hearing. There's no – There's been no order from that hearing and I have not had a transcript of that hearing –
>
> THE SPECIAL REFEREE: Your argument is specious, Mr. Erspamer. I directed you to provide an order as to that, and you failed to do so. And now to come in here and say I wasn't able to comply with the order because I didn't get one, although I was ordered to write and didn't —
>
> MR. ERSPAMER: Excuse me.
>
> THE SPECIAL REFEREE: You know, if we were at the courthouse you'd be walking down the hall now with the bailiff.
>
> MR. ERSPAMER: Your Honor, that –
>
> THE SPECIAL REFEREE: Let's take a five minute break.
>
> MR. ERSPAMER: That portion of the –
>
> THE SPECIAL REFEREE: I said let's take a five minute break. Amazing.
>
> (Recess taken.)

(R. Doc. 134; pp. 52-53)

C. The Offers of Settlement.

On September10, 2001, Kolupar served Wilde with an offer of settlement in accordance with the provisions of

Wis. Stats. § 807.01(3) wherein Kolupar offered to settle all claims against Wilde for $35,000.00, including attorneys fees. (R. Doc. 83) Wilde rejected this offer.[1]

On November 28, 2001, Kolupar served Wilde with a second offer of settlement, also in accordance with the provision of Wis. Stat. § 807.01(3). (R. Doc. 85; R.-App.-121) Kolupar's settlement offer proposed to settle all claims against Wilde for $8,600.00, plus taxable costs and attorneys fees in the amount of $25,000.00. (R. Doc. 85; R-App.-121)

On December 13, 2001, Wilde responded by serving Kolupar with two offers of judgment, as permitted by Wis. Stat. § 807.01(2). In the first offer of judgment, Wilde offered to allow judgment to be taken in the amount of $6,600.00, plus taxable costs, as is determined by the court. (R. Doc. 86, p. 3; R.-App.-123) In the second offer of judgment, Wilde offered to allow a judgment for attorneys fees to be taken in the amount of $15,000.00, to be added to the overall judgment. Kolupar accepted the first offer of judgment for

[1]Although offers of settlement are not normally filed with the court, Kolupar's attorney filed the offer of settlement with the court at the same time the offer was served on Wilde. Thus, the offer of settlement became a part of the court record at the time Kolupar's attorney filed the offer of settlement with the court.

$6,600.00, plus taxable costs to be determined by the court, but rejected the offer of $15,000.00 to be assessed for attorneys fees. (R. Doc. 86)

On February 25, 2002, Judge Cooper heard Kolupar's motion for default judgment against Thompson. (R. Doc. 127) Although Thompson had been represented by counsel, no formal answer or other responsive pleading had ever been filed to the complaint on Thompson's behalf. At the conclusion of the hearing, Judge Cooper granted the motion for default judgment against Thompson and indicated that the trial date set for May 13, 2002 would be utilized for the purpose of making a fact-finding determination of what attorneys fees should be awarded Kolupar based upon the judgment entered against Thompson, and the judgment entered against Wilde based on its offer of judgment. (R. Doc. 127, p. 13)

D. Kolupar's Hearing Seeking an Award of Reasonable Attorneys Fees.

Although the Court had scheduled a fact-finding hearing for May 13, 2002, Kolupar did not file a motion requesting an award of attorneys fees. On Friday, May 10, 2002, Kolupar Faxed Wilde's counsel a memorandum and

supporting affidavit requesting that attorneys fees in the amount of $43,935.00 (303 hours at $145 per hour) be awarded. (R. Doc. 99, p. 10) This request did not include any itemization as to costs or expenses that were to be included as a part of the attorneys fees.[2] (R. Doc. 99)

Despite the failure to file a motion requesting attorneys fees, or any other supporting documentation, Judge Cooper conducted a two-day evidentiary hearing to determine the reasonableness of attorneys fees and costs to be awarded to Kolupar. (R. Doc. 128 and 129) Judge Cooper stated that he intended to take testimony from Judge Crivello and seek his recommendation as to the reasonableness of attorneys fees that should be allowed in the proceeding. (R. Doc. 128, pp. 9-10) Judge Cooper indicated that both Kolupar and Wilde would have an opportunity to examine Judge Crivello regarding his recommendation. (R. Doc. 128, p. 11)

In response to this request, Judge Crivello advised the court that, in his 15 years as circuit court judge, he had

---

[2] Proof of costs/fees submitted by Kolupar at the motion to reconsider were never addressed by the court and Wilde was never given an opportunity to question the validity of the same. Therefore, Wilde disputes Kolupar's assertion at page 7 of her Supreme Court Brief that her costs in the amount of $10,673.62 was undisputed.

". . .never seen a $6,000.00 case grow barnacles the way this one has." (R. Doc. 128, p. 12) Judge Crivello further indicated that he recalled ". . .three or four instances where I sanctioned Mr. Erspamer myself by barring the presentation of testimony, or documents, or witnesses," and, on another occasion, he had ruled that Ms. Gutenkunst ". . .was foreclosed from presenting any more documents. . ." based on her prior representations that all documents in Wilde's possession had been produced. (R. Doc. 128, pp. 12-13)

Judge Crivello was then questioned by counsel for both Wilde and Kolupar during the course of the hearing. At the conclusion of his testimony, Judge Cooper requested Judge Crivello to make a recommendation to the court as to what fees and costs should be allowed, and noted that counsel for ". . .the parties can present testimony and respond to [the recommendation] in their argument." (R. Doc. 128, p. 87)

In response to this request, Judge Crivello recommended that the court award Kolupar $15,000.00 in fees and costs. (R. Doc. 128, p. 88; R-App.-125) In making his recommendation, Judge Crivello noted that ". . .the discovery and evidentiary issues in this case were grossly inflated."

(R. Doc. 128, p. 87; R-App.-128) He also recommended that the trial court reject the fee submission by Kolupar's counsel, as Kolupar had been ordered to the submit fees in February, but the fees, in fact, were not submitted until May 10, 2002, which was ". . .typical of the kind of things that occurred in this case." (R. Doc. 128, p. 88; R.-App.-128)

At the conclusion of his testimony, Judge Crivello recommended that Judge Cooper consider awarding Kolupar $15,000.00 in fees. (R. Doc. 128, p. 88; R.-App.-128)

Judge Cooper then heard testimony presented by counsel for Kolupar in support of their request for attorneys fees. During the course of the testimony, counsel for Kolupar advised the Court that testimony was being presented in order to address each element of SCR 20:1.5. (R. Doc. 128, pp. 94-95)

At the conclusion of the two-day hearing, Judge Cooper concluded that an award of $15,000.00 in attorneys fees and costs was reasonable under the circumstances of the case. (R. Doc. 129, p. 73)

In reaching his decision, Judge Cooper noted that under the facts of this case, an award of attorneys fees and costs, less than that being requested, was appropriate for a number of

reasons, including the fact that the case had been over pled, starting with the "shotgun pleading" filed by Kolupar, the fact that too much discovery was conducted, and the fact that numerous deadlines imposed by the court had been missed. (R. Doc. 129, p. 72) Judge Cooper also noted that the issue of what constitutes reasonable fees depends upon the facts of the case, and noted that he had, in the past, awarded $18,000.00 in attorneys fees in a case where a $500.00 judgment was attained. (R. Doc. 129, p. 71)

In reaching his conclusion, Judge Cooper did not assign blame solely to either party, but, rather, concluded that ". . .there is nobody here with clean hands, so that is the order of the court." (R. Doc. 129, p. 74)

E. The Appellate Court Decision.

Judge Cooper's decision was appealed and the Court of Appeals, in a 2-1 decision, affirmed the trial court decision. (Court of Appeals Decision) Specifically, the appellate court concluded that Judge Cooper had not abused his discretion when awarding attorneys fees and costs in Kolupar's favor, based upon the facts of the case. (Court of Appeals Decision, ¶¶ 17-18)

Judge Ralph Adam Fine, however, issued a dissenting opinion. Kolupar, in her brief now filed with the Supreme Court, relies in substantial part upon the rationale and statements of Judge Fine in his dissenting opinion.

While it is not customary to address a dissenting opinion, because Kolupar has placed such reliance upon that decision, the dissenting opinion will be discussed in more detail in this brief. Suffice it to say, Judge Fine's dissenting opinion is not based upon the facts contained in the record in this case.

ARGUMENT

I. THE TRIAL COURT'S DETERMINATION AS TO REASONABLE ATTORNEYS FEES AND COSTS TO BE ALLOWED IN THIS ACTION MUST BE AFFIRMED, ABSENT AN ABUSE OF DISCRETION.

A. Standard of Review.

A trial court's determination of the reasonableness of attorney's fees will be sustained unless there is an abuse of discretion. *Standard Theatres, Inc. v. Department of Transportation*, 118 Wis. 2d 730, 747, 349 N.W.2d 661 (1984). "[T]he trial court is in an advantageous position to make a determination as to the reasonableness of a firm's rates." *Standard Theaters*, 118 Wis. 2d at 747. "Accordingly,

[appellate courts] will give deference to the trial court's exercise of discretion." *Aspen Services, Inc. v. IT Corporation*, 220 Wis. 2d 491, 495, 583 N.W.2d 849 (Ct. App. 1998).

When the reasonableness of attorney's fees is challenged on appeal, the appellate court does not make an independent review of the matter, nor does it make its own determination of reasonableness. *Aspen Services*, 220 Wis. 2d at 495. Furthermore, deference to a trial court's determination as to what constitutes reasonable attorney's fees is even more appropriate where fees and costs are reduced to promote civility in litigation. *Id.* at 495-96. In reviewing a discretionary decision, the appellate court will "examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach." *Crawford County v. Masel*, 238 Wis. 2d 380, 383, 617 N.W.2d 188 (Ct. App. 2000).

B. The Basis of the Trial Court's Determination.

The trial court properly exercised its discretion based upon the facts of this case.

As noted above, the trial court is in the most advantageous position to make the determination as to the reasonableness of attorney's fees. *Standard Theatres*, 118 Wis. 2d at 747. This is because the trial court has the ability to observe the quality of the services that have been rendered throughout the case, beginning with its inception. *Tesch v. Tesch*, 63 Wis.2d 320, 335, 217 N.W.2d 647 (1974) "[The trial judge] has the expertise to evaluate the reasonableness of the fees with regard to the services rendered." *Tesch*, 63 Wis. 2d at 335.

For this reason, the Wisconsin Supreme Court has held that "[t]he trial court's determination of the value of these fees will be sustained unless there is an abuse of discretion." *Standard Theatres*, 118 Wis. 2d at 747. In other words, the appellate courts of this state must give deference to the trial court's exercise of discretion in the award of attorney's fees. *Aspen Services*, 220 Wis. 2d at 495. "The burden of proof is upon the attorney submitting the fees to prove the reasonableness of a fee when it is questioned." *Standard Theatres*, 118 Wis. 2d at 748.

In *Village of Shorewood v. Steinberg*, 174 Wis. 2d 191, 496 N.W.2d 57 (1993), the Supreme Court of Wisconsin stated that "Supreme Court Rule 20:1.5 lists factors which help determine the reasonableness of an attorney's fee." *Village of Shorewood*, 174 Wis. 2d at 205. Supreme Court Rule 20:1.5.(a) provides that:

> A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

However, the above-stated factors are not the only factors that may be considered by the trial court in determining the reasonableness of attorney's fees. In fact, the express language of SCR 20:1.5.(a) provides that the factors to be considered *"include"* the above-stated factors, thus implying that the stated factors are not an exhaustive list of factors to be considered.

Kolupar makes several arguments to support her contention that the trial court abused its discretion in this case, none of which have merit.

First, Kolupar argues that the trial court should have addressed each factor contained in SCR 20:1.5. when rendering its decision relating to the assessment of attorneys fees. (*See*, e.g., Kolupar Sup. Ct. Br., pp. 21-24) It is undisputed that the trial court was aware of the factors since Kolupar's attorney extensively briefed (R. Doc. 99) and specifically advised the court that testimony was being presented as to each factor contained in SCR 20:1.5. (R. Doc. 128, pp. 94-95) Kolupar cites no authority to support this proposition, and Wilde submits that the recitation of each factor is not a condition precedent to sustaining a determination by a

trial court as to the reasonableness of attorneys fees. *First Bank v. Nicolaou*, 113 Wis. 2d 524, 538 fn. 15, 335 N.W.2d 849 (Ct. App. 1998)

Second, Kolupar argues that the trial court improperly relied upon the recommendation of Judge Crivello, who acted as a Special Master in this case. (*See*, e.g., Kolupar Sup. Ct. Br., pp. 47-49) In regard to that contention, it is important to recognize that Judge Crivello did not make the decision regarding the award of attorneys fees, but merely a recommendation based upon his extensive involvement in the proceeding and his observation as to the conduct of the proceedings. Further, as the transcripts from the hearings before Judge Crivello will demonstrate, Judge Crivello did have sufficient understanding of the case to make a recommendation to the trial court. (*See*, e.g., R. Doc. 133, pp. 6-7)

As Judge Cooper noted, the Court of Appeals has approved the use of a referee, or Special Master, to resolve discovery disputes. (R. Doc. 128, p. 93) *Id., Aspen Services,* 220 Wis. 2d 491. If a referee is appointed by a trial court to resolve contentious discovery issues, why then is that referee's opinion as to the reasonableness of attorneys fees, particularly

when much of the attorneys fees involves discovery disputes, not a relevant factor for a trial court to take into consideration? That question is not answered in Kolupar's brief.

Third, Kolupar argues that Judge Cooper improperly refused to consider the first factor listed in SCR 20:1.5.(1)(a), that being the time and labor involved by Kolupar's attorney in pursuing this claim. (*See*, e.g., Kolupar Sup. Ct. Br., p. 23) While Kolupar cites no portion of the record to support this assertion, Wilde would note that Judge Cooper, in addressing this issue, stated:

> . . .I want to make it also perfectly clear I am absolutely certain that counsel put in exactly the amount of time on this case that he says. That is not in doubt by this Court. I am satisfied counsel put in every second that he said he put in on this case.

(R. Doc. 128, pp. 94-95)

Finally, Kolupar argues that the trial court decision adopted a "standard of proportionality" where attorneys fees will not be awarded in situations where the fees significantly exceed the amount recovered. (*See*, e.g., Kolupar Sup. Ct. Br., p. 30) Again, Kolupar makes no reference to the trial court record to support this contention, thereby making it difficult to respond to the assertion. This argument is

inconsistent with the argument Kolupar made to the trial court. During the May 13, 2002 hearing, Kolupar argued that testimony being offered was relevant and should be considered by the court for the purpose of establishing ". . .the proportionality of the fees to the actual result obtained." (R. Doc. 128, p. 92)

Wilde would also note that Judge Cooper clearly was not concerned that there needed to be a proportional relationship between the award of attorneys fees and the amount of the judgment. In fact, Judge Cooper noted, when rendering his decision, that he had, in the past, awarded $18,000.00 in attorneys fees in a case where the judgment was only $500.00. (R. Doc. 129, p. 71)

In summary, and bearing in mind the standard by which appellate courts review determinations made by trial courts when awarding attorneys fees, Kolupar's contention that Judge Cooper abused his discretion in making the award of attorneys fees in this case is not consistent with the record. Indeed, the record establishes both parties had extensively briefed the issue (R. Doc. 96; R. Doc. 99), and the record establishes that Judge Cooper was aware of the factors contained

in SCR 20:1.5., and Judge Cooper's decision reflects an understanding and analysis of those factors.

II. KOLUPAR'S ARGUMENTS MISSTATE THE RECORD PRESENTED TO THE TRIAL COURT.

Much of Kolupar's arguments, as well as the dissenting opinion issued by Judge Fine in this case, are premised upon:

a. A misstatement of the facts and record in this case; and/or

b. A refusal to accept Judge Cooper's finding that this case was over pled, over discovered, and over tried, and that Kolupar's counsel bears a proportionate share of responsibility for that result.

By way of illustration, the following statements and arguments are now presented by Kolupar, and, to some extent, are echoed by Judge Fine in his dissenting opinion. These contentions, or arguments, include the following:

1. *That Wilde failed to settle Kolupar's pre-litigation demand and then played "hard ball" by refusing*

to assume responsibility for Thompson's actions until the case was settled in December, 2001. Wilde forced Kolupar to file this lawsuit and should be responsible for all attorneys fees and costs incurred by Kolupar.

The pre-litigation demand for payment of $13,000.00 contained no explanation as to how that settlement demand was arrived at. (R. Doc. 104, Ex. A; R-App.-102) Wilde immediately responded by noting that the vehicle for which the settlement demand was presented was not a vehicle owned by Wilde, but, rather, a vehicle owned by Thompson, and sold by Thompson to Kolupar. (R. Doc. 104, Ex. B; R-App.-106) Wilde contended in its response that Wilde had no responsibility for this transaction under any theory of law asserted by Kolupar. (R. Doc. 104, Ex. B; R-App.-106)

Nothing further was heard from Kolupar for nearly five years. When Kolupar finally commenced litigation, just before the statute of limitations had expired, Wilde immediately asserted the same affirmative defense as had been set forth in response to the settlement demand letter. (R. Doc. 7) While the case was ultimately settled, Wilde has never changed its position

regarding the issue of liability for the sale of Thompson's vehicle.

To suggest that Wilde was somehow not acting in good faith because it failed to present a counteroffer to resolve this claim, flies in the face of both common sense and good business judgment. If one were to accept this argument, then, it would logically follow that businesses in the State of Wisconsin would be subject to attorneys fees in consumer transactions simply because the business failed to respond to a demand letter with a counteroffer.

What is even more troubling is that Kolupar, despite the arguments made to this court, recognized that there existed a significant affirmative defense relating to whether Thompson had the apparent authority to bind Wilde. In his testimony at the May 13, 2002 hearing, Attorney Paul Erspamer testified as follows:

> [by Attorney Lisko]
> Q And what were the affirmative defenses that you had to deal with as a civil plaintiff's lawyer?
>
> [by Attorney Erspamer]
> A Well, the affirmative defenses that they raised were, of course, the authority issue, which we – I wanted them to raise

> because that is what they said in their letter when they turned down our offer, so – of $13,000.00 and didn't respond at all.

(R. Doc. 128, p. 107)

Mr. Erspamer, continuing his testimony, noted that this affirmative defense was the one ". . .that was pushed hardest in the briefing and at the hearing before Judge Malmstadt. . ." and that whether there was apparent authority to bind Wilde ". . .was a tougher one to read." (R. Doc. 128, p. 109)

The trial court was also of the opinion that the issue of whether Thompson had the apparent authority to bind Wilde was not one that could be resolved easily or summarily. (R. Doc. 126, pp. 34-36) Wilde's motion for summary judgment relating to *this issue* was denied by the trial court. (R. Doc. 74; R.-App.-128) Thus, it is apparent that Kolupar's attorney, as well as the trial court, both recognized that the issue of whether Thompson had the apparent authority to bind Wilde under the facts of this case was a significant issue that needed to be resolved by trial. To argue, then, as Kolupar now argues, that Wilde was only attempting to play "hard ball" and run up legal expense when that defense was raised and maintained, is not only contradicted by the record, but is simply without merit.

2. *That Wilde caused Kolupar to incur additional expense by its dilatory tactics. In particular, and by way of example, Wilde filed a motion to change venue to Waukesha County. That motion was denied.*

Kolupar, in her demand letter of June 14, 1995, stated, in part, that if Wilde failed to pay the demand of $13,000.00, Kolupar would ". . .file a lawsuit against you in Waukesha County Circuit Court. . ." and later that ". . .should you choose to ignore this letter your next communication from us will be a Summons and Complaint filed in Waukesha County Circuit Court." (R. Doc. 104, Ex. A; R.-App.-102)

The transaction took place in Waukesha County, and Wilde's business is located in Waukesha County. Kolupar threatened to file suit in Waukesha County. Why, then, is a demand to change venue from Milwaukee County to Waukesha County evidence of dilatory tactics on the part of Wilde?

Kolupar also argued, and Judge Fine in his dissent notes, that Wilde argued, in its brief supporting a request to change venue, that the only rationale apparent to Wilde was that Milwaukee County juries are often "more generous" when rendering verdicts than are Waukesha County verdicts.

Whether this argument was made, which Wilde concedes, does not allow one to conclude that the motion was a dilatory tactic, or an effort to require Kolupar to incur additional legal expense. Rather, the motion was based upon the requirements of Wis. Stat. § 801.50. In this case, the transaction occurred in Waukesha County; the parties resided in Waukesha County; Wilde's place of business was located in Waukesha County; and, even Kolupar's attorneys, in their demand letter, recognized that Waukesha County was an appropriate venue.

3. *That, in its answer, Wilde denied Thompson was a Wilde manager, as Kolupar had alleged in her complaint, thereby requiring Kolupar to undertake substantial and extensive discovery.*

It is somewhat difficult to respond to this argument because Kolupar does not identify which part of the answer to the complaint is brought into issue by this allegation.

In paragraph 3 of its complaint, Kolupar alleged that Thompson "at all times material hereto" was acting as a manager for Wilde. (R. Doc. 1) Wilde denied information or knowledge to form a belief as to that allegation because Wilde

was uncertain at the time the answer was filed as to what was meant by "at all times material hereto." (R. Doc. 7)

Thompson had left Wilde's employ shortly after the March 1994 Kolupar transaction and, therefore, it was difficult to determine, *in the earliest stage of the pleading,* what Kolupar meant by this particular allegation. Wilde never denied that Thompson, at the time of the transaction, was an employee of Wilde.

In paragraph 4 of her complaint, Kolupar asserted that Thompson was acting in his capacity as a manager for Wilde at the time the transaction occurred. (R. Doc. 1) That allegation was denied (R. Doc. 7) and, indeed, the issue raised by the allegation was the central dispute in the case. Wilde's defense as to this issue was asserted in good faith, and despite settlement of the controversy, Wilde has never wavered from that position.

It is easy, particularly in hindsight, to argue that a specific allegation, or a portion of a specific allegation, should have been answered differently. Conversely, Wilde would argue that had the pleading been more specific, the entire issue could have been resolved early and quickly in this litigation.

4. *That Wilde's attorneys deposed one of Kolupar's friends about Kolupar's employment as a topless dancer and Kolupar's desire to have breast augmentation implant surgery. This conduct is evidence of egregious, sleazy, and Rambo-type tactics.*

Once again, it is difficult to respond to these types of allegations because neither Kolupar, nor Judge Fine in his dissenting opinion, cite any portion of the record to support these statements.

Suffice it to say, Wilde, at no time, deposed any of Kolupar's friends about Kolupar's employment as a topless dancer or her desire to have breast augmentation implant surgery.

There was testimony in the record regarding breast augmentation implant surgery. This testimony was elicited during a deposition of Thompson, conducted by Kolupar's attorneys. Thompson offered this information in response to questions by Kolupar's attorney as to the reason Kolupar wanted to trade the Sunbird automobile which had been damaged in an accident. (R. Doc. 58, pp. 6-7)

Simply stated, this type of argument, as well as Judge Fine's dissenting opinion upon which Kolupar now relies in attributing these arguments to Wilde, have nothing to do with the issue of whether the trial court abused its discretion in awarding attorneys fees as a result of this litigation.

5. *That Wilde filed a motion for summary judgment to which Kolupar had to respond. The trial court denied the motion.*

Once again, Kolupar argues that the filing of the motion for summary judgment required Kolupar to respond and thereby incur additional attorneys fees. (*See*, e.g., Kolupar Sup. Ct. Br., pp. 13-14) While indeed Kolupar was required to respond, the statement that the motion for summary judgment was denied is misleading at best. Wilde's motion for summary judgment was *granted in part, and denied in part.* (R. Doc. 74; R.-App.-128)

6. *That the trial court ordered two mediation sessions, which resulted in additional costs, and that Wilde made no offer of settlement during the first mediation session.*

This argument is particularly troubling because mediation sessions are to remain confidential. *See*, Wis. Stats.

§ 904.085. If offers, or lack of offers, that result from mediation sessions are to become the source of later decisions by trial courts in awarding, or denying an award of, attorneys fees, then the entire principle behind, and purpose of, mediation sessions will be defeated.

It is particularly disturbing that Judge Fine, in his dissenting opinion, references the mediation sessions and actions which were purportedly taken by the parties during the mediation sessions. Wis. Stat. § 802.12(4) provides that mediation sessions involve compromised negotiations for the purposes of Wis. Stat. §§ 904.08 and 904.085. The discussion, to the extent they occurred, and offers of settlement, to the extent that they were made or to the extent they were not made, are inadmissible in any court proceeding. *See*, Wis. Stat. § 904.085(3). Thus, Kolupar's arguments to the court, and Judge Fine's dissenting opinion, which are based upon the events occurring in the mediation, as related by Kolupar's attorney, should not even be considered by the court.

III. THE TRIAL COURT FOUND THAT KOLUPAR'S ATTORNEY, WAS, IN PART, RESPONSIBLE FOR EXCESSIVE LITIGATION COSTS. THIS FINDING WAS PROPERLY TAKEN INTO CONSIDERATION BY THE TRIAL COURT IN DETERMINING THE REASONABLENESS OF ATTORNEYS FEES.

The trial court found that this lawsuit was over pled, that too much discovery was conducted, and that entirely too much litigation expense was incurred in resolving what should have been a relatively simple dispute. (R. Doc. 129, p. 72)

Wilde has accepted Judge Cooper's finding that this case was over tried. However, Kolupar(and Judge Fine by his dissent), either ignore, or refuse to accept, that finding of fact. As Judge Cooper noted in his decision, neither party has "clean hands" in this transaction. (R. Doc. 129, p. 74)

Kolupar's contention that Kolupar should have been awarded *all* legal expenses and costs incurred in pursing this action, cannot be sustained unless the court is willing to set aside Judge Cooper's finding that both parties are responsible for this result. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the

witness. *See*, Wis. Stats. § 805.17(2) *See also, Tourtillott v. Ormson Corp.*, 190 Wis. 2d 295, 526 N.W.2d 515 (Ct. App. 1994)

Because Kolupar does not accept Judge Cooper's finding, the arguments presented to the Supreme Court do not address this issue. Rather, Kolupar ignores Judge Cooper's finding and argues that unless the court approves an award of all attorneys' fees and expenses *claimed by Kolupar*, then litigants involved in consumer-type actions will be deterred from bringing claims in the future.

While a successful litigant in this type of claim is entitled to reasonable attorneys' fees and costs, that litigant is not entitled to recover actual attorneys' fees and costs. In determining reasonable attorneys' fees and costs, certainly the conduct of the Plaintiff's counsel is relevant, particularly where that conduct was a significant contributory factor in the amount of actual attorneys' fees claimed by the Plaintiff.

It is also significant to note that Kolupar has never explained how the claim for attorneys' fees and costs more than doubled between November 28, 2001, when Kolupar offered to settle her claim for $8,600.00, plus $25,000.00 in taxable costs

and attorneys' fees, and December 13, 2001, when Kolupar agreed to accept Wilde's offer of judgment for $6,600.00, plus taxable costs as determined by the court.

CONCLUSION

Simply stated, the issue on this appeal is whether Judge Cooper abused his discretion in awarding reasonable attorneys fees to Kolupar. Judge Cooper rendered his decision based upon the facts of the case, and having taken into consideration the factors set forth in SCR 20:1.5., *including the conduct of the parties during the course of the litigation*. Judge Cooper's decision represents an exercise, not an abuse, of discretion, and must be affirmed.

Kolupar was entitled to reasonable costs, including attorneys' fees. The Plaintiff is not, however, entitled to all costs and attorneys' fees incurred in this action, particularly where those costs and attorneys' fees were excessive, and particularly, where the Plaintiff's counsel contributed significantly to the excessive costs and fees incurred in litigating this matter.

Kolupar asks the Supreme Court, in effect, to substitute its judgment for that of the trial court. That is not the

appropriate standard of review in this case, and accordingly, the trial court's determination awarding reasonable attorneys' fees and costs in this action, based upon all of the facts and circumstances of this case, including the factors set forth in SCR 20:1.5, as well as the conduct of the parties during the course of the litigation, must be sustained.

Dated this 31st day of December, 2003.

Respectfully submitted,

CRAMER, MULTHAUF & HAMMES, LLP
Attorneys for Defendant-Respondent,
Wilde Pontiac, Cadillac, Inc.

BY: _____

JAMES W. HAMMES
State Bar I.D. #01016120
KATHRYN SAWYER GUTENKUNST
State Bar I.D. #01000329

1601 East Racine Avenue • Suite 200
P.O. Box 558
Waukesha, WI 53187-0558
Phone: 262-542-4278

CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 6,277 words.

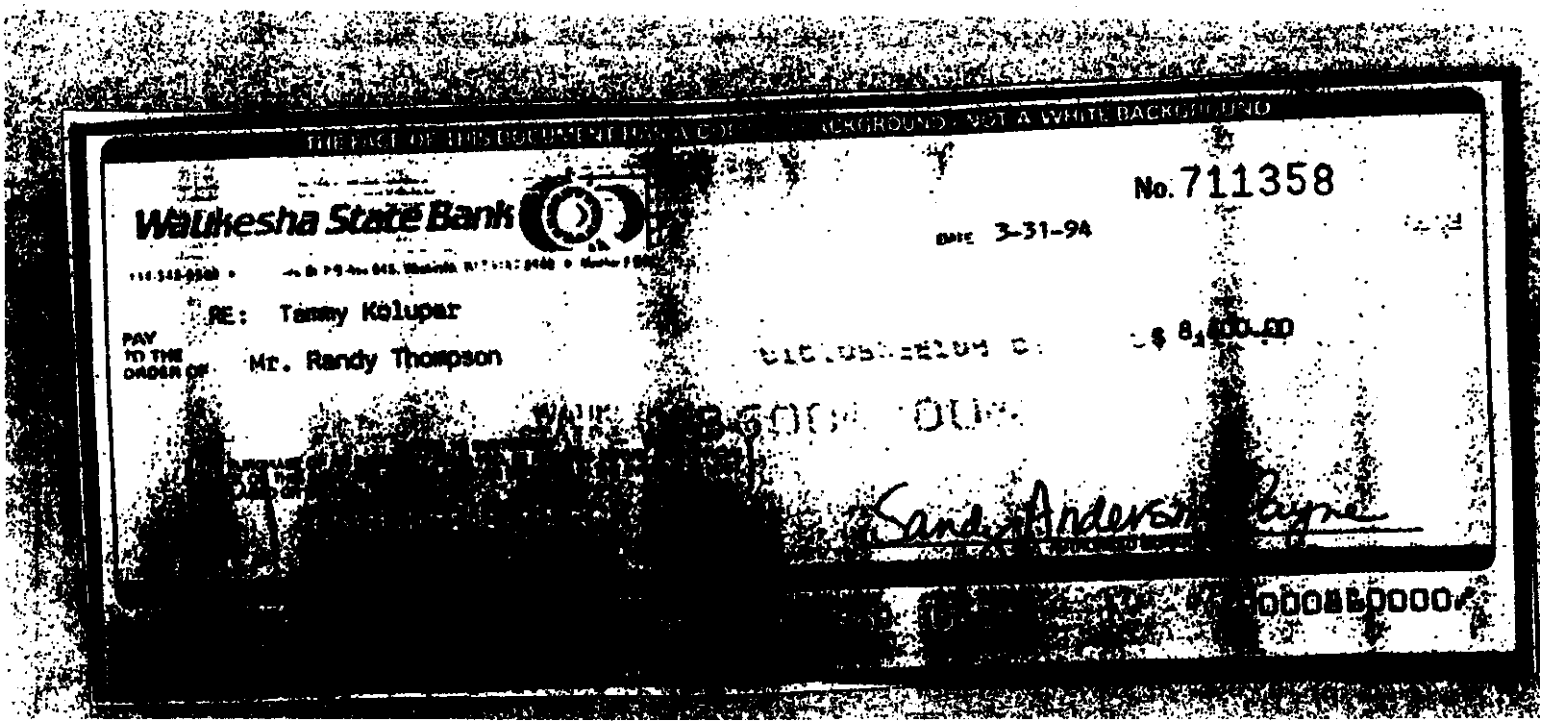
Dated this 31st day of December, 2003.

BY: _____

JAMES W. HAMMES
State Bar I.D. #01016120
KATHRYN SAWYER GUTENKUNST
State Bar I.D. #01000329

DEFENDANT-RESPONDENT'S APPENDIX

Table of Contents **Page**


Waukesha State Bank
No. 711358
DATE 3-31-94
RE: Tammy Kolupar
PAY TO THE ORDER OF Mr. Randy Thompson
$ 8,000.00

JASTROCH & LABARGE, S.C.

A PROFESSIONAL SERVICE CORPORATION
ATTORNEYS AT LAW
P.O. BOX 1487
FREEDOM SQUARE
640 W. MORELAND BLVD.
WAUKESHA, WISCONSIN 53187-1487

PHONE 414-547-2611

TELECOPIER 414-547-6195

LEONARD A. JASTROCH
GERALD L. LABARGE

BRADLEY J. BLOCH
ALAN T. TARNOWSKI
WILLIAM S. POCAN
RANDALL M. ARONSON
DAVID J. LISKO
VINCENT P. MEGNA
PAUL M. ERSPAMER
KAREN M. APPEL
DOUGLAS C. GOEB

ATTORNEY
PAUL M. ERSPAMER

June 14, 1995

General Manager
Wilde Pontiac of Waukesha
1603 East Moreland Boulevard
Waukesha, Wisconsin 53186

Re: Tammy Kolupar Transaction Involving Randy Thompson
Date of Sale: March 28, 1994
Our File No. 37 862

Dear Sir:

This office represents Tammy Kolupar, who first purchased an automobile from your dealership, a 1993 Pontiac Sunbird, in 1993. In March of 1994, your then Sales Manager, Randy Thompson, suggested that she trade in the Pontiac Sunbird for a 1985 Mercedes Benz 19E 4-door. Mr. Thompson indicated that Wilde Pontiac was "just getting the Mercedes on the lot."

Ms. Kolupar agreed to the trade-in arrangement suggested by Mr. Thompson, brought in her Pontiac Sunbird to your dealership and picked up the Mercedes Benz at your lot on March 30, 1994. She did not receive the title at the time she picked up the vehicle and, in fact, did not receive the title until approximately April 4, 1994.

When she received the title, she saw that the vehicle had been titled in the name of Mr. Thompson, and in fact did not appear to be a vehicle owned by Wilde Pontiac at the time of the sale.

Shortly thereafter, the odometer on the vehicle stopped functioning. She also developed problems with the transmission, brakes, an axle which she was told had previously been bent, and non-functioning power windows. She had to undergo substantial repair expenses at Berndt Classic Imports and spent hundreds of dollars attempting to repair the vehicle. Despite this, she was unable to get the vehicle to a point where it functioned reliably for her, which caused her to ultimately give up and sell the vehicle for $2,000.00.

Ms. Kolupar reports that the Mercedes which she obtained from your lot on March 30, 1994 had a non-functioning speedometer, which was not disclosed to her on the Certificate of Title, in violation of Wisconsin and Federal law. In particular, 15 U.S.C., Sections 1986, 1988 and 1989 provide for triple damages for a person harmed through a failure to provide an accurate odometer statement.

In addition, Ms. Kolupar was not provided with the vehicle disclosure, which is required by Section Trans. 139.04 in the Wisconsin Administrative Code. As you know, Section Trans. 139.04(6) requires a used motor vehicle label, which must appear on the car, to state that the vehicle is used and the prior use must be clearly and specifically disclosed. As you also know, Section Trans. 139.04(4) requires disclosure, on a label to appear on the car, of the results of a "walk-around" and interior inspection, under-hood inspection, under-vehicle inspection and a test-drive.

None of this information was disclosed to Ms. Kolupar before her trade-in transaction in which she gave up her Pontiac Sunbird in exchange for the 1985 Mercedes.

Finally, the title she finally obtained on or about April 4, 1994 disclosed that the vehicle was not owned by Wilde Pontiac, but instead owned individually by Mr. Thompson. Of course, Mr. Thompson had told her that she was purchasing the vehicle from Wilde Pontiac. Mr. Thompson was a sales manager at Wilde Pontiac at the time and his statements to her were untruthful and fraudulent. His statements were made with the intention of inducing Ms. Kolupar to enter into the transaction because he wished to bring about a transaction with her Pontiac Sunbird and he wished to have an opportunity to unload his Mercedes, which had obviously given him mechanical trouble. His untruthful and fraudulent statements to her, while employed as a sales manager at Wilde Pontiac, constitute a violation of the Wisconsin statute which prohibits fraudulent misrepresentations in commercial transactions. That statute, Section 100.18, prohibits any person, corporation or their employee from making untrue, deceptive or misleading statements or representations in connection with commercial sales to the public.

Mr. Thompson's actions in selling a motor vehicle owned by him at the Wilde Pontiac dealership premises also constitutes a violation of Section 100.18(5) of the Wisconsin Statutes, since the sale at the Wilde Pontiac lot constituted an untrue representation that the motor vehicle was owned by Wilde Pontiac (which would suggest that Ms. Kolupar would have remedies against Wilde Pontiac rather than against Mr. Thompson, personally).

The bottom line here is that a very serious consumer fraud was worked against Ms. Kolupar by Randy Thompson, your sales manager. His actions reflect directly upon Wilde Pontiac. Consequently, Ms. Kolupar purchased a motor vehicle which had severe and substantial mechanical problems, for a price of $10,300.00.

Mr. Thompson arranged for Ms. Kolupar's financing at the Waukesha State Bank, utilizing the assistance of his girlfriend, who was a bank employee and apparently an assistant loan officer.

In any event, Ms. Kolupar now faces litigation commenced by the bank to collect the balance on the loan. Her damages consist of her $2,000.00 down payment, approximately $1,800.00 made in car payments and for repairs, and a balance of approximately $9,200.00 still owed to the Waukesha State Bank, for a total of $13,000.00.

Tammy Kolupar was 18 years old at the time of this transaction. It is clear that your employee, Mr. Thompson, took advantage of her and violated several provisions in both the Wisconsin and Federal Consumer laws.

The purpose of this letter is to advise you that we represent Tammy Kolupar and that we are prepared to negotiate a resolution of her claim against Wilde Pontiac within the next 15 days, or file a lawsuit against you in Waukesha County Circuit Court, alleging the above consumer-referenced violations of State and Federal law. If it is necessary to resort to a lawsuit, we will seek actual attorneys' fees as allowed under the Federal Odometer Fraud Statute, as well as under the Wisconsin Statute (Section 100.18), together with triple damages (under the Odometer fraud statute). Ms. Kolupar also has remedies under sec. 718.01(9)(b) of our statutes, which relates to the rules governing motor vehicle dealerships.

I know that in earlier communications (before my involvement), Wilde Pontiac has taken the position that the Mercedes sale was a private matter between Mr. Thompson and Ms. Kolupar. In this regard, I direct your attention to the fact that Mr. Thompson represented that the Pontiac-for-Mercedes deal was a "trade-in." I also direct your attention to sec. 100.18(5), which was violated in that Mr. Thompson delivered the Mercedes to Tammy Kolupar on your lot, with "Wilde Pontiac" signs visible everywhere. Finally, I address your attention to the attached "F & I - DEAL WORKSHEET" document prepared by Mr. Thompson on a computer, apparently at your dealership, and given to Tammy Kolupar to show her the financing terms. Mr. Thompson clearly represented to Tammy Kolupar that she was dealing directly with Wilde Pontiac.

I will leave it to you to assess the damage to Wilde Pontiac's goodwill and credibility when the local news media learns of a transaction in which an 18 year old is swindled by your sales manager who tells her she is buying a trade-in vehicle from your dealership, but leaves her with his own 9-year old, high-mileage sports car with defective brakes, a bent axle and an inoperative odometer.

I invite your response to this demand letter. Ms. Kolupar indicates that she is willing to settle, during the next 15 days, for her single damages of $13,000 (which includes the sum the Waukesha State Bank is seeking to collect from her). Should you choose not to accept her offer, we will seek the statutory triple damages plus actual attorneys' fees through the litigation process.

Should you choose to ignore this letter, your next communication from us will be a Summons and Complaint filed in Waukesha County Circuit Court.

Thank you for your attention to this matter.

Sincerely,

JASTROCH & LABARGE, S.C.

Paul M Erspamer

PAUL M. ERSPAMER

PME/sb

cc: Tammy Kolupar

CRAMER, MULTHAUF & HAMMES
ATTORNEYS AT LAW

KATHRYN SAWYER GUTENKUNST

SUITE 200
1601 EAST RACINE AVENUE
POST OFFICE BOX 558
WAUKESHA, WISCONSIN 53187
TELEPHONE (414) 542-4278
TELECOPIER (414) 542-4270

July 6, 1995

Paul M. Erspamer, Esq.
Jastroch & LaBarge, S.C.
P.O. Box 1487
Freedom Square
640 W. Moreland Blvd.
Waukesha, WI 53187-1487

Re: Tammy Kolupar transaction involving Randy Thompson
Date of Sale: March 28, 1994
Your File No.: 37 862

Dear Mr. Erspamer:

This office represents Wilde Pontiac, Cadillac, Inc.

Your recent correspondence of June 14, 1995 has been turned over to our attention.

Any transaction between Mr. Thompson and your client relating to a 1985 Mercedes Benz 19E was outside the scope of Mr. Thompson's employment at Wilde.

At no time did Wilde have any ownership interest in the Mercedes Benz which you claim your client purchased, nor did we ever place that vehicle on our lot for sale.

In addition, as you note in your correspondence of June 14, 1995, the title which your client received indicated that the vehicle was owned individually by Mr. Thompson rather than Wilde.

Secondly, we have no record of your client ever paying to Wilde any sums of money for the purchase of the 1985 Mercedes Benz 19E.

Any representations which Mr. Thompson may have made to Ms. Kolupar were made in his individual capacity and outside the scope of this employment at Wilde Pontiac, Cadillac, Inc.

Your reference to Wisconsin Statute §100.18 is misplaced as Wilde did not undertake or initiate any fraudulent representations to induce your client to purchase a vehicle which it did not own and did not receive benefit from.

Secondly, you make reference to §718.01(9)(b) of the Wisconsin Statutes. No such section exists.

I am assuming that you are referring to Chapter 218 of the Wisconsin Statutes which does in fact govern the actions of automobile dealerships.

Again, I would point out that Wilde had no role in the transaction between Mr. Thompson and your client as it relates to the purchase of the 1985 Mercedes Benz 19E.

The only files which Wilde has within its possession with regard to your client is the purchase of a 1993 Pontiac Sunbird on April 4, 1994 at which time a lien was satisfied to M&I Wauwatosa State Bank in the sum of $10,675.96 for your client's benefit.

I trust that this will terminate your threats and accusations against Wilde Pontiac, Cadillac, Inc.

If there is any further correspondence necessary with regard to Ms. Kolupar, please send it to my attention directly.

Very truly yours,

Kathryn Sawyer Gutenkunst

KSG:jk
cc: Ms. Sharon Bloom
Mr. Patrick Donahue

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

TAMMY KOLUPAR,

Plaintiff,

vs.

Case No. 00-CV-2571
Case Code: 30703

WILDE PONTIAC, CADILLAC, INC.
and RANDALL THOMPSON,

Defendants.

ORDER

Plaintiff, Tammy Kolupar, by her attorneys, Lisko & Erspamer, S.C., having moved the Court to compel discovery regarding unresponded document requests served on the Defendant on July 12, 2000; and

It appearing to the Court that, consequently, depositions scheduled by the parties have been cancelled; and

It appearing to the Court that the Court needs to establish a schedule in order to resume discovery in an orderly fashion.

NOW, THEREFORE, IT IS HEREBY ORDERED:

That discovery in this case shall continue along the following schedule:

1. Defendant, Wilde Pontiac, Cadillac, will respond to Plaintiff's document requests, by providing copies of all materials requested, including Randall Thompson's personnel file and all documents in the possession of Wilde Pontiac, Cadillac "pertaining to any motor vehicle purchase, sale or trade-in transaction between Tammy Kolupar and defendants, including, but not limited to, (a) 1993 Pontiac Sunbird and (b) 1985

Mercedes Benz no later than thirty (30) days after September 25, 2000;

2. Depositions of Plaintiff, Tammy Kolupar, and of Mr. Jim Vanderveldt, the present General Manager of Wilde Pontiac, Cadillac will be completed no later than forty-five (45) days after September 25, 2000.

Dated at Milwaukee, Wisconsin this _____ day of _____, 2000.

BY THE COURT:

_____
MICHAEL MALMSTADT
Circuit Judge, Br. 39

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

TAMMY KOLUPAR,

Plaintiff,

vs.

Case No. 00-CV-2571
Case Code: 30703

WILDE PONTIAC, CADILLAC, INC.
and RANDALL THOMPSON,

Defendants.

ORDER ARISING FROM PLAINTIFF'S MOTION FOR DISCOVERY SANCTIONS

The parties having appeared before me on November 27, 2000 on a motion filed by the Plaintiff, Tammy Kolupar, seeking discovery sanctions against the Defendant, Wilde Pontiac, Cadillac, Inc., based upon an assertion that Defendant, Wilde Pontiac, Cadillac, Inc., has failed to fully and completely provide documents in its possession relating to any transaction between Defendant and Plaintiff involving a 1985 Mercedes Benz and a 1993 Pontiac Sunbird motor vehicle.

The Court having heard the arguments of counsel and having reviewed the materials and affidavits filed by the parties, now makes the following Order:

1. Based upon the assertions of Defendant's counsel that Defendant, Wilde Pontiac, Cadillac, Inc., has no more documents other than those already provided, the motion by Plaintiff for discovery sanctions shall be held in abeyance, without costs to either party;

2. Defendant, Wilde Pontiac, Cadillac, Inc., is and will be barred from introducing, admitting or otherwise utilizing any documents relating to said Mercedes or said Pontiac not heretofore disclosed to Plaintiff, for purposes of

FEB 15 2001

admissibility at trial, for purposes of cross examination or for any other purpose whatsoever, including impeachment;

3. If it is subsequently shown to the Court's satisfaction that Defendant has withheld documents requested by Plaintiff, the Court reserves the right to impose additional sanctions and remedies, including default judgment and including sanctions against the offending attorney;

4. That Plaintiff, Tammy Kolupar, and Defendant's general manager, James Vanderfeld, will both appear for deposition on December 12, 2000, as scheduled by the parties in open Court;

5. That the deposition scheduled for Randall Thompson on Thursday, November 30, 2000 is hereby cancelled. Mr. Thompson's deposition will be rescheduled at a time convenient for all the parties, said deposition to be scheduled no later than the close of business on Monday, December 4, 2000; and

6. That any further discovery disputes between the parties will be referred by the Court to be heard and decided by a special master, who will be retired Circuit Judge, Honorable Frank T. Crivello. Judge Crivello will be paid for his time at his usual mediation billing rate, ~~with all costs of Judge Crivello's time to be paid by the non-prevailing party in any dispute decided by him.~~ by both parties equally. The Court retains jurisdiction to allocate the cost of Judge Crivello's time at the time of trial. MM -2-14-01

Dated at Milwaukee, Wisconsin this 14 day of December, ~~2000~~ February 2001.

BY THE COURT:

Michael J. Malmstadt
Circuit Judge, Br. 39

COPY

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

TAMMY KOLUPAR,

Plaintiff,

vs.

Case No. 00 CV 002571

Code No. 30703

WILDE PONTIAC, CADILLAC, INC., a Wisconsin corporation, and RANDALL THOMPSON,

Defendants.

FILED
39 JUL 20 2001 39
JOHN BARRETT
Clerk of Circuit Court

ORDER

The above-captioned matter having come on for hearing on May 24, 2001 before Frank Crivello, special master in the above-captioned matter, regarding a request for a protective order by the defendant, Wilde Pontiac, Cadillac, Inc., relative to producing its financial statements to plaintiff; and the plaintiff appearing by her attorneys, Lisko & Erspamer, S.C. by Paul M. Erspamer, the defendant, Randall Thompson, appearing by his attorneys, Atinsky, Kahn, Sicula & Teper by Philip L. Atinsky, and the defendant, Wilde Pontiac, Cadillac, Inc., appearing by Patrick Donahue and by its attorneys, Cramer, Multhauf & Hammes, LLP by Kathryn Sawyer Gutenkunst; and special master Frank Crivello having heard arguments of counsel and reviewed the files, records, and proceedings heretofore had;

Now, therefore,

IT IS HEREBY ORDERED:

1. That the financial statements of the defendant, Wilde Pontiac, Cadillac, Inc., for 1994 and 1999 shall be produced to special master Frank Crivello

LAW OFFICES OF
CRAMER, MULTHAUF
& HAMMES, LLP
1601 E. RACINE AVENUE
WAUKESHA, WI 53186

within ten (10) days of May 24, 2001, which documents will be reviewed by special master Frank Crivello *in camera*. In the event special master Frank Crivello determines that the contents of said financial statements are insufficient, the defendant, Wilde Pontiac, Cadillac, Inc., will be notified to produce additional information.

2. Said documents shall be held by special master Frank Crivello until such time as a finding is made by the trial court that plaintiff has established a *prima facie* case wherein punitive damages may be available. At such time, the financial statements will be provided to the trial court by the special master.

3. In the event the trial court does not find the plaintiff has made a *prima facie* showing which would allow for a claim of punitive damages, the financial statements shall be returned to the defendant, Wilde Pontiac, Cadillac, Inc., forthwith.

Dated this 12 day of ~~June~~ July, 2001.

Frank Crivello, Special Master

ts\ksg\clients\wilde\pontiac\kolupar\pld-Order re financial statements

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

TAMMY KOLUPAR,

Plaintiff,

vs.

WILDE PONTIAC, CADILLAC, INC., a Wisconsin corporation, and RANDALL THOMPSON,

Defendants.

Case No. 00 CV 002571

Code No. 30703

FILED

AUG 23 2001

JOHN BARRETT
Clerk of Circuit Court

ORDER

The above-captioned matter having come on for hearing on ~~May 24~~ May 24, 2001 before Frank Crivello, special master in the above-captioned matter, regarding a request for a protective order by the defendant, Wilde Pontiac, Cadillac, Inc., relative to producing its financial statements to plaintiff; and plaintiff appearing by her attorneys, Lisko & Erspamer, S.C. by Paul M. Erspamer, defendant, Randall Thompson, appearing by his attorneys, Atinsky, Kahn, Sicula & Teper by Philip L. Atinsky, and defendant, Wilde Pontiac, Cadillac, Inc., appearing by Patrick Donahue and by its attorneys, Cramer, Multhauf & Hammes, LLP by Kathryn Sawyer Gutenkunst; and special master Frank Crivello having heard arguments of counsel and reviewed the files, records, and proceedings heretofore had; and as special master Frank Crivello directed plaintiff's attorney to prepare an Order and the same having not been prepared in a timely fashion;

And the above-captioned matter having come on for an additional hearing on June 17, 2001 and special master Frank Crivello having heard arguments of counsel and reviewed the files, records, and proceedings had;

LAW OFFICES OF
CRAMER, MULTHAUF
& HAMMES, LLP
1601 E. RACINE AVENUE
WAUKESHA, WI 53186

IT IS HEREBY ORDERED:

1. That the unsigned responses of defendant, Wilde Pontiac, Cadillac, Inc., to discovery shall stand as original as though the same were signed at the time of submission to plaintiff.

2. That plaintiff shall present Frank Holland for telephonic deposition within thirty (30) days of the date of this hearing. Any documents Frank Holland has responsive to any request tendered by defendant, Wilde Pontiac, Cadillac, Inc., shall be provided to said defendant twenty-four (24) hours prior to his telephonic deposition. In the event Frank Holland is not made available for deposition within thirty (30) days of the date of this hearing, his testimony and any documents he might have produced had he been deposed will be excluded from trial.

Amended at the hearing of July 17, 2001 as follows:

Plaintiff shall produce Frank Holland for purposes of a telephonic deposition on or before July 31, 2001. In the event Frank Holland is not produced as required herein, he shall not be allowed to testify at the time of trial. Any and all documents in Frank Holland's possession relative to the Mercedes Benz which is the subject of this lawsuit shall be produced by facsimile 24 hours prior to the deposition or on the date of the deposition should they be discovered by examination. Any document not produced in that fashion will not be used at trial unless introduced by Wilde Pontiac, Cadillac, Inc.

3. That plaintiff shall provide an itemization of damages with figures and/or estimates for every item claimed as damages and totals within thirty (30) days of the date of this hearing.

Amended at the hearing of July 17, 2001 as follows:

Plaintiff complied with said request on June 21, 2001.

4. That plaintiff shall submitted with particularity her exhibits that may be used at trial.

Amended at the hearing of July 17, 2001 as follows:

Plaintiff complied with said request in June 2001.

5. That defendant, Wilde Pontiac, Cadillac, Inc., may not introduce any other documents at trial not previously produced with the exception of documents produced by plaintiff.

6. That plaintiff shall itemize with particularity within ten (10) days of the date of this hearing those documents her expert, Keith Baisden, will use in formulating his opinion. The itemization will be by title and deposition exhibit number. If not done within ten (10) days, Keith Baisden will not testify at trial.

Amended at the hearing of July 17, 2001 as follows:

Plaintiff shall provide a sworn affidavit from Keith Baisden no later than August 15, 2001. Said affidavit shall state all of the opinions to which Keith Baisden will testify in this case. The affidavit shall have an appendix and appended thereto and referred to by him in the affidavit will be every document he relied upon in formulating those opinions. If said affidavit is not received by August 15 with a copy being provided to Special Master Frank Crivello, Keith Baisden will not testify in this case.

7. That defendant, Wilde Pontiac, Cadillac, Inc., shall provide to plaintiff the business address for Amy Miller (sic) within five (5) days of the date of the hearing.

Amended at the hearing of July 17, 2001 as follows:

The deposition of Amy (Mueller) Huber has been completed.

8. That discovery shall be extended sixty (60) days from the date of this hearing.

Amended at the hearing of July 17, 2001 as follows:

All discovery shall be closed July 31, 2001 except as stated herein, i.e., the affidavit of Keith Baisden, and further, plaintiff will have the opportunity to depose former Wilde used car manager Jon Green on or before August 15, 2001.

9. That defendant, Wilde Pontiac, Cadillac, Inc., and plaintiff shall file within five (5) days of the date of this hearing an amended pretrial report including addresses of the witnesses that may be called at the time of trial.

Amended at the hearing of July 17, 2001 as follows:

That has been complied with.

ADDITIONAL ORDERS FROM THE JULY 17, 2001 HEARING ARE AS FOLLOWS:

10. That defendant, Wilde Pontiac, Cadillac, Inc., shall provide the date of birth and last known address for former Wilde used car manager Jon Green on or before July 31, 2001.

11. In the event plaintiff fails to timely respond to the Request for Production of Documents tendered by the defendant, Wilde Pontiac, Cadillac, Inc., via correspondence dated June 21, 2001, said defendant may ask for an extension of discovery by letter under the five-day rule.

Dated this 16th day of ~~July~~ Aug, 2001.

Frank Crivello, Special Master

ts\ksg\clients\wilde\pontiac\kolupar\pld-Order of Kolupar

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

TAMMY KOLUPAR,

Plaintiff,

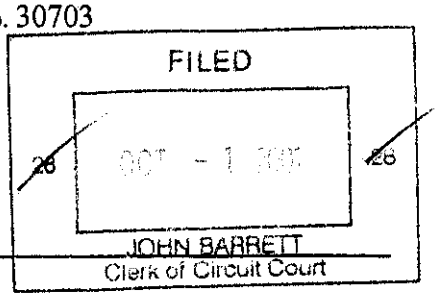
vs.

WILDE PONTIAC, CADILLAC, INC., a Wisconsin corporation, and RANDALL THOMPSON,

Defendants.

Case No. 00 CV 002571

Code No. 30703



ORDER

The above-captioned matter having come on for hearing on August 16, 2001 before Frank Crivello, special master in the above-captioned matter; and plaintiff appearing by her attorneys, Lisko & Erspamer, S.C. by Paul M. Erspamer, and the defendant, Wilde Pontiac, Cadillac, Inc., appearing by its attorneys, Cramer, Multhauf & Hammes, LLP by Kathryn Sawyer Gutenkunst; and special master Frank Crivello having heard arguments of counsel and reviewed the files, records, and proceedings heretofore had;

Now, therefore,

IT IS HEREBY ORDERED:

1. That the defendants shall have the opportunity to order the transcript of the deposition taken of Bradley Braun on August 10, 2001. After receipt of said transcript, they shall have the right to impose any objections which may have been interposed at the time of the deposition, in writing, with a copy of those objections being filed with special master Frank Crivello.

LAW OFFICES OF
CRAMER, MULTHAUF
& HAMMES, LLP
1601 E. RACINE AVENUE
WAUKESHA, WI 53186

2. In the event either of the defendants desire to continue the deposition of Bradley Braun, they may provide written notice of that deposition and proceed with the same.

3. The request of defendant, Wilde Pontiac, Cadillac, Inc., for a copy of the retainer agreement between plaintiff and her attorneys shall be handled in the following manner: by stipulation of the parties, the written retainer agreement shall be filed with special master Frank Crivello within ten (10) days of August 16, 2001. In the event special master Frank Crivello believes that additional information is required, he will do so by written demand to plaintiff's counsel. In the event that the trial court determines that plaintiff's attorney fees are an issue, a request of special master Frank Crivello shall be made and the retainer agreement turned over at that time.

4. Any document plaintiff has not produced or referred to with specificity, either at the time of deposition, response to production of documents, or supplementation thereto, shall not be used at the time of trial.

5. If, during the period of time in which the plaintiff supplements her responses to discovery, i.e., certain documentation which plaintiffs indicate will be forthcoming from the State of Florida, the defendants determine and/or discover that additional discovery is necessary, they may apply to special master Frank Crivello for an extension of the discovery deadline, with notice to the other parties.

6. The request of defendant, Wilde Pontiac, Cadillac, Inc., for plaintiff's tax returns from 1992 to the present is denied based upon plaintiff's stipulation that she earned sufficient funds from the time of the purchase of the subject vehicle through the present to make the loan payments to Waukesha State Bank, and further, to satisfy any judgment obtained by Waukesha State Bank.

7. Plaintiff's expert, Keith Baisden, shall be barred from testifying at the time of trial as no affidavit was produced, per the earlier order of special master Frank Crivello.

Dated this 24th day of September, 2001.

Frank Crivello, Special Master

ts\ksg\clients\wilde\pontiac\kolupar\pld-Order re untimely dep notice

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

TAMMY KOLUPAR,

Plaintiff,

vs.

Case No. 00-CV-2571
Case Code: 30703

WILDE PONTIAC, CADILLAC, INC.
and RANDALL THOMPSON,

Defendants.

OFFER OF SETTLEMENT

TO: Wilde Pontiac, Cadillac, Inc.
c/o Attorney Kathryn Sawyer Gutenkunst
Cramer, Multhauf & Hammes, LLP
1601 East Racine Avenue, Suite 200
Waukesha, Wisconsin 53187-0558

Pursuant to sec. 807.01, Wis. Stats., the plaintiff, hereby offers to settle all claims with Wilde Pontiac, Cadillac, Inc., on the following terms:

1. Defendant, Wilde Pontiac, Cadillac, Inc. shall pay to the plaintiff the sum of $8,600.00 in damages;

2. Defendant, Wilde Pontiac, Cadillac, Inc. shall pay to the plaintiff the sum of $25,000.00 in attorney fees and litigation costs (made payable to Lisko & Erspamer, S.C.);

Please take notice that if you do not accept this offer as provided in sec. 807.01(3), Wis. Stats., and the plaintiff recovers a more favorable judgment, sec. 807.01(3), Wis. Stats. provides that the plaintiff shall recover double the amount of her taxable costs and disbursements.

Please further take notice that if you do not accept this offer as provided in sec. 807.01(3), Wis. Stats., and the plaintiff recovers a judgment which is greater than or equal to the foregoing Settlement Offer amount, sec. 807.01(4), Wis. Stats. provides that the plaintiff shall be entitled to interest at the rate of twelve (12) percent per annum on the amount recovered from the date of this Offer of Settlement until the amount is paid.

This Offer of Settlement must be accepted within ten (10) days of receipt thereof.

Dated at Waukesha, Wisconsin, this 28th day of November, 2001.

LISKO & ERSPAMER, S.C.
Attorneys for Plaintiff

Paul M. Erspamer
State Bar No. 1010824

MAILING ADDRESS:
Sunset Plaza, Suite 201
W229 N1433 Westwood Drive
Waukesha, Wisconsin 53186
(262) 896-2090
(262) 896-2081

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

TAMMY KOLUPAR,

Plaintiff,

vs.

Case No. 00 CV 002571

Code No. 30703

WILDE PONTIAC, CADILLAC, INC.,
a Wisconsin corporation, and
RANDALL THOMPSON,

Defendants.

OFFER OF JUDGMENT

Pursuant to Wis. Stat. § 807.01(1), the Defendant, Wilde Pontiac, Cadillac, Inc., hereby offers to allow judgment to be taken against said Defendant in the above-captioned matter for the sum of Six Thousand Six Hundred ($6,600) Dollars plus the taxable costs of the action.

Dated this 13th day of December, 2001.

CRAMER, MULTHAUF & HAMMES, LLP,
Attorneys for Defendant, Wilde Pontiac, Cadillac, Inc.

BY: _____
Kathryn Sawyer Gutenkunst
(State Bar No. 01000329)

CRAMER, MULTHAUF & HAMMES, LLP
Suite 200
1601 East Racine Avenue
P.O. Box 558
Waukesha, WI 53187
(262)-542-4278

LAW OFFICES OF
CRAMER, MULTHAUF
& HAMMES, LLP
1601 E. RACINE AVENUE
WAUKESHA, WI 53186

I certify that on December 13, 2001, I served the within paper on other counsel of record by mail, pursuant to Wis. Stat. § 801.14.

BY: _____

t\ksg\clients\wilde\pontiac\kolupar\pld-Offer of Judgment

All right. I have terminated Judge Crivello's testimony under 904.03. It's just cumulative, wasting time. Enough's enough. I do, however -- you are the special master and I would like you to make a recommendation to the Court on what the Court should do so that the parties can present testimony and respond to it in their argument.

Judge Crivello.

MR. CRIVELLO: If it please the Court. As the Court knows, I have spent a considerable amount of time on this case as a quasi judicial officer, and I have a lot of experience in this area.

Just to put my recommendation into some context, this is a case which would ultimately settle for, I understand, $6,600.00. This is just barely above a small claims case.

Having examined the case in terms of discovery and evidence over the course of three hearings and months of correspondence, I think that the discovery and evidentiary issues in this case were grossly inflated. This was a two-person transaction for an automobile. This wasn't Arch Diocese versus Lloyds of London, for example.

My fees on this case get to be more than the amount of the case. My fees as special master. I think that in a situation like this in my opinion the Court should do equity. And in my opinion equity in this case is this:

I think that the sensible way to dispose of this matter would be to reject the fee submission as not timely filed. You ordered it in February -- February 25th. Was submitted last week, as I understand.

And in my judgment that is typical of the kind of things that occurred in this case. So I would disallow the fee petition and I would adopt the offer in judgment and award the plaintiff the $6,600.00, which apparently she has accepted, and I would award $15,000.00 from the defendant to the plaintiff in fees. And that is how I would dispose of this case if I were asked to.

I am troubled -- and I don't mean to be offensive to these lawyers, who I have a great deal of professional respect for, but I am troubled with the notion of hanging up an agreement that benefits the plaintiff and which the plaintiff was to obtain because of this fee issue. And I don't think the case is worth much more than 15,000 in fees, frankly. Although I know both sides spent a lot more time than that.

When lawyers decide to do that, then they bear the onus of that decision. And I guess that is all I have to say, Judge.

THE COURT: Thank you, Judge Crivello. I appreciate your recommendation. Appreciate your service on this case, your patience. And you are free to go and pick

up your son.

MR. CRIVELLO: Thank you, your Honor.

THE COURT: I am going to leave the room for five minutes and let the two lawyers talk to themselves based upon the recommendation of Judge Crivello. Then we'll recommence.

(Pause.)

THE COURT: All right, back on the record. It doesn't look like the parties wish to take Judge Crivello's recommendation and consideration.

All right. It is 3:30. We got another hour, hour and a half. Is there any other witnesses?

MR. ERSPAMER: We'd call Tammy Kolupar, the plaintiff.

THEREUPON,

TAMMY KOLUPAR,

the plaintiff herein, having been first duly sworn, was examined and testified as follows:

THE COURT: Have a seat. State your name; spell it for the record.

THE WITNESS: Tammy Lynn Kolupar, K-o-l-u-p-a-r.

MR. LISKO: Your Honor, this is David Lisko. I am going to be doing the questioning of this witness.

DIRECT EXAMINATION

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

TAMMY KOLUPAR,

Plaintiff,

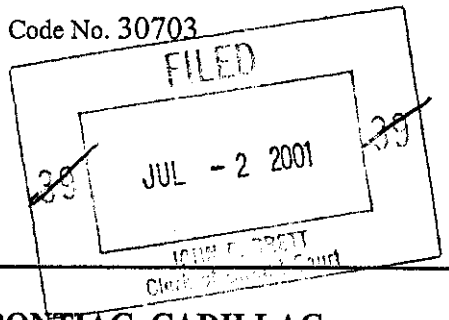
vs.

WILDE PONTIAC, CADILLAC, INC., a Wisconsin corporation, and RANDALL THOMPSON,

Defendants.

Case No. 00 CV 002571

Code No. 30703



ORDER ARISING FROM WILDE PONTIAC, CADILLAC, INC.'S MOTION FOR SUMMARY JUDGMENT

The above-entitled matter having come on for a hearing on the 13th day of June, 2001 before the Honorable Michael Malmstadt, Circuit Court Judge, on the motion of the Defendant, Wilde Pontiac, Cadillac, Inc., for an order for summary judgment; and

The Plaintiff, Tammy Kolupar, having appeared in person and by her attorneys, Lisko & Erspamer, S.C. by Paul M. Erspamer, and the Defendant, Wilde Pontiac, Cadillac, Inc. having appeared by its attorneys, Cramer, Multhauf & Hammes, LLP by Kathryn Sawyer Gutenkunst, and the Defendant, Randall Thompson, not appearing; and

The Court having heard the arguments of counsel, reviewed the record heretofore filed and being fully and sufficiently advised in the premises;

NOW, THEREFORE, upon all of the records, minutes, and proceedings hereinbefore held, and upon the motion of the Defendant, Wilde Pontiac, Cadillac, Inc.,

LAW OFFICES OF
CRAMER, MULTHAUF
& HAMMES, LLP
1601 E. RACINE AVENUE
WAUKESHA, WI 53186

IT IS HEREBY ORDERED:

1. Plaintiff's cause of action for violation of the Federal Odometer Law is hereby dismissed with prejudice.

2. As a material issue of fact exists relative to Defendant, Randall Thompson's, apparent authority and whether his actions were within the scope of his employment, the motion for summary of judgment of Defendant, Wilde Pontiac, Cadillac, Inc., is denied.

Dated at Waukesha, Wisconsin this 2 day of June, 2001.

BY THE COURT:

Michael Malmstadt

The Honorable Michael Malmstadt
Circuit Court Judge Presiding

ts\ksg\clients\wilde\pontiac\kolupar\pld-Order Arising from Wilde's MSJ

IN THE
SUPREME COURT OF WISCONSIN
COURT OF APPEALS (DISTRICT I) CASE NO. 02-1915
MILWAUKEE CIRCUIT COURT CASE NO. 02-CV-002571

TAMMY KOLUPAR,

Plaintiff-Appellant-Petitioner

v.

WILDE PONTIAC CADILLAC, INC.
and RANDALL THOMPSON,

Defendants-Respondents.

ON APPEAL FROM THE CIRCUIT COURT
OF MILWAUKEE COUNTY
HONORABLE THOMAS R. COOPER, PRESIDING

REPLY BRIEF

LISKO & ERSPAMER, S.C.
Attorneys for Plaintiff-Appellant,
Tammy Kolupar
By: Paul M. Erspamer
State Bar No. 1010824
Sunset Plaza, Suite 201
W229 N1433 Westwood Drive
Waukesha, Wisconsin 53186
(262) 896-2090

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Wisconsin Statutes

Other Authorities

I. WILDE IS RESPONSIBLE FOR THE FEES INCURRED WHILE IT PROLONGED THIS LITIGATION, WHILE IT EVADED RESPONSIBILITY FOR ITS PREDATORY AND DECEPTIVE PRACTICES THROUGH ITS STRATEGY OF DENIAL, DELAY AND INTIMIDATION.

Wilde's Affirmative Defense About Its "Central Dispute In the Case" Cannot Be Used As A Shield To Prevent A Consumer Who Recovers 100% Of Her Damages From Recovering Reasonable Fees And Costs Needed To Achieve That Result.

Wilde had a good faith, unsuccessful defense, so it argues it need not pay Kolupar's fees although she recovered all of her damages just before trial.

Wilde would admit responsibility for Kolupar's fees only if she proves it exercised bad faith in defending the claim. Wilde offers no legal support for this new argument.

First, Wilde did nothing to resolve the claim before suit. Embarking on what Appellate Judge Ralph Adam Fine described as a "scorched-earth" "sleazy" and "Rambo" campaign, Wilde prolonged litigation, increasing costs.

To recover fees and costs Kolupar need not prove bad faith, or prove Judge Fine's characterizations are true. Kolupar must only show she prevailed, that fees and expenses were reasonable, calculated at a reasonable rate.

Kolupar prevailed after two years, two pre-trials, two failed mediations, and after discovery closed when Wilde offered $6,600.00 and costs (the $6,600.00 price, less $2,000.00 sale proceeds). Kolupar recovered her damages.

Our federal courts define "prevailing party" thus:

> "Liability on the merits and responsibility for fees go hand-in-hand...
> "Therefore, to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits on his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought [citations], or comparable relief through a consent decree or settlement."

Farrar v. Hobby, 506 U.S. 103 (1992).

In federal courts, a prevailing party who settles before trial is awarded fees just as if she prevailed at trial:

> "The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees. Nothing in the language of 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination ..."

Maher v. Gagne, 448 U.S. 122, 129 (1980).

Wilde at p. 23 argues no responsibility for fees for Kolupar's demand letter, but no such charge is in this invoice. (R. 103, 3-7)(App. 18, 1-5). Yet "it is reasonable to award attorney's fees for time spent on demand letters . . ." *Hughes v. Chrysler*, 188 Wis. 2d 973, 523 N.W.2d 197, 204 (Ct. App. 1994)*aff'd* 197 Wis. 2d 973, 542 N.W.2d 148 (1996).

Wilde's "worksheet" (R.104, Exh. "D")(Reply App. B) has a "trade" value on Kolupar's Pontiac which used car manager, Bradley Braun, accepts (R. 58, 7) and resells at a profit (R. 68,4)(Reply App. D). Thompson's deal spread "like wildfire"

(R. 99, 2) said Braun, also a manager, who did nothing to stop it.

Sales manager Thompson showed this was a "trade-in" in writing (R. 104, Exh. C) (Reply App. C). But Wilde's Mr. Donahue said Kolupar (who transacted Wilde's profitable deal 19473 with it) is not his "customer" so Wilde is not responsible (R. 129,28-29).

Wilde's only offer came after Kolupar's attorneys spent two years exposing its fraud, unnecessary if Wilde had come to its senses earlier. Wilde's tactics (withholding discovery, bringing time-consuming motions for protective orders, change of venue and summary judgment and conducting humiliating interrogations) little impacted Wilde's "central dispute in the case" (*See* p. 27). Wilde's tenacious struggle (denying Thompson's managerial status and his obvious authority) drove up everyone's fees.

Kolupar alleged Thompson was sales manager, and Wilde denied it. Kolupar's request for Thompson's employment file required Judge Malmstadt's order to compel (R. 27). A 1992 "pay program document" from the file shows Thompson as "Pontiac New Car Manager." A termination checklist from 1994 calls him "NC Sales Manager," and a "payroll department" document calls him "new car manager." (R. 63, 32-34) (Reply App. A, 2-4).

Thompson admits he was Pontiac sales manager, and earlier was finance manager(R. 63, 9-10). He prepared a worksheet showing a "trade" in "Deal 19473" on Wilde's computer(R. 104, Exh. D)(Reply App. B). Yet Wilde conceded only that Thompson was "assistant" manager. (R. 63, 16).

Wilde deposed Ms. Anderson-Payne, a loan officer in August, 2000. Thompson had faxed her a GMAC "Customer Statement" calling this deal a "trade-in" of a Pontiac for a Mercedes. (R. 63, 26-27) (App. 14). Thompson's document, from forms available to him (R. 63, 11)corroborated Kolupar that this was a trade-in.

If Wilde's "good faith question" as to Thompson's status and authority, why did that continue after Ms. Anderson-Payne produced Thompson's "statement" proving he called the deal a "trade-in?" Once Wilde saw Thompson's denial (Wilde's brief, 1) was impeached in documents he prepared, Wilde's good faith defense evaporated. Judge Malmstadt said: ". . . maybe somebody at Wilde Pontiac better take a look . . . <u>This GMAC document shows she traded in the Pontiac on a Mercedes</u>" (R. 125, 14, 18)(App. 11). In August 2000, fees were $2,029.39. (R. 103)(App. 18). Wilde was silent.

Under *Crawford County v. Masel*, 2000 WI App. 172, 238 Wis. 2d 380, 617 N.W.2d 188 (Ct. App. 2000) a court may reduce fees (where the hours are billed at a reasonable rate and

actually expended) only with "evidence to support the reduction" showing time was billed unreasonably. 2000 WI App. 172 ¶ 16. A judge determines if specific discovery or motions were unneeded. This Judge Cooper failed to do. Judge Cooper echoed Mr. Crivello's conclusions that the action was "over-tried" and "over-pled," cited by Wilde at 21 and 31 as fact-finding, insulated from review. These legal conclusions are ripe for review. Kolupar settled at the first opportunity. All her claims (including Wisconsin odometer fraud but not federal odometer remedies) survived summary judgment. The decision on review affirming this flawed determination jeopardizes Wisconsin's long policy encouraging private enforcement of cases under remedial legislation.

II. NEITHER WILDE'S BRIEF NOR THE RECORD DEMONSTRATE THAT THE COURTS BELOW FOLLOWED A PROPER DISCRETIONARY DECISION-MAKING PROCESS, OR THAT THERE WAS ANY ANALYTICAL BASIS FOR THE $15,000.00 AWARD OF COSTS AND FEES, OTHER THAN THAT WAS WHAT WILDE WAS WILLING TO PAY.

Judge Cooper never acknowledged that SCR 20:1.5 standards governed his discretionary determination, or applied them to the facts. Twice he expressly rejected "the time and labor required . . ." (SCR 20:1.5(1)(a)) which is also the lynch pin of the federal "lodestar" standard.

Wilde at 17, 20 argues this Court can infer Judge Cooper followed correct standards in awarding fees, solely because Kolupar cited the standards and offered evidence addressing

them. Yet, Judge Cooper refused to consider time devoted to Kolupar's result:

> "Now, as to the settlement and whether it came early, whether it came late, I can't draw anything negative to one side or the other because that is the way all of this is set up and that's why we have mediation and people go through it. And there are economic decisions to be made..."

(R. 129, 73)(App. 9)[emphasis added].

When Judge Cooper declined consideration of attorney's time expended, he departed from any Wisconsin standard. He further decided, with no authority, to off-set Wilde's obligation to pay this prevailing consumer's fees, by considering Wilde's own fees:

> "The flip side is Wilde has to swallow whatever fees they have. I think that establishes what the statute intended by the fee-scheduling statute."

(R. 129, 73)(App.9)

Wilde says one can assume Judge Cooper considered correct factors, never cited by him, in calculating the exact award Wilde offered:

> "I am ordering $15,000.00 fee to plaintiff for attorney's fees and costs that was originally submitted as an offer of judgment."

(R. 129, 73)(App. 9)[emphasis added].

In refusing to consider the time spent by Kolupar's attorney, and refusing to consider whether Wilde's only offer "came early, whether it came late, I can't draw anything

negative . . ." (App. 9, 73). Judge Cooper rejected SCR 20:1.5(1)(a), requiring him to consider "the time and labor required . . ."

When Mr. Crivello conceded a prudent defendant assesses a claimant's case early to avoid fees, (R. 128, 48-49), Judge Cooper said this was "not particularly material" (R. 128, 48) showing he viewed the time needed for Kolupar's recovery as irrelevant, not controlling.

Judge Fine notes that reducing a meritorious consumer's recovery by considering defense costs is unsupported:

> "The trial court also justified its minimal award of attorney fees to Kolupar because '[t]he flip side is Wilde has to swallow whatever fees they have.' Neither the trial court nor the Majority cites any authority for this startling proposition - that a rich defendant can frustrate at every turn a poor plaintiff's quest for justice and then say when the fee-shifting day of reckoning has arrived, 'I have substantial attorneys fees myself, I shouldn't also have to pay the plaintiff's.'"

2003 WI App. 175, ¶31.

Under *Bahr v. Bahr*, 107 Wis. 2d 72, 318 N.W.2d 391 and *Marriage of King v. King* , 224 Wis. 2d 235, 590 N.W.2d 480 (1999), a court may not acknowledge factors governing a determination in form, but disregard them in substance. Moreover, a court must ". . . illuminate the reasoning which produced the resulting award," reflecting application of the

correct standard. *See Bahr*, 107 Wis. 2d at 78. This judge did far less than judges reversed in *Bahr* and *King*. Judge Cooper mentioned no controlling standard and found his own, producing a result alien to governing law.

Other than reducing fees awarded Kolupar while considering Wilde's costs in unsuccessfully defending itself, Judge Cooper never said which guideline he followed.

Instead Of Criticizing The Dollar Amount Obtained, The Lower Court Should Have Considered The Nature Of The Result Obtained, Where Defendant Re-Paid 100% Of Kolupar's Purchase Price From This Fraudulent Sale, But Only After The Pre-Trial, After The Close Of Discovery And Just Before Trial.

Kolupar should be applauded for accepting Wilde's belated offer. Yet, former referee Crivello ridiculed her small recovery. Kolupar settled when 100% of her damages were offered. It is unfortunate Wilde withheld its offer on this modest claim until just before trial, but that was wholly within Wilde's control. Wilde squandered mediation opportunities and ignored settlement overtures. Wilde paid Kolupar's claim at the last minute and shifted the battle from its fraud -- a battle it could not win -- to Kolupar's fees. By settling, Kolupar conserved judicial time, shortening a week-long trial into a brief hearing. To encourage settlement this resolution should be viewed the same as one after trial. (*See Maher v. Gagne*, supra). If she had refused

settlement, Kolupar would face criticism for "over-trying" the case (under *Aspen*, supra) and under *Marek v. Chesny*, 473 U.S.1 *and Duello v. Regents*, 220 Wis. 2d 554, 571, 583 N.W.2d 863 (Ct. App. 1998) may not have been awarded post-offer fees.

The decision on review sends an undesirable message, that consumers must try their cases to demonstrate their merit before fees and costs are fully recoverable.

Kolupar was confident of success, but not certain of receiving more than $6,600.00. Kolupar responsibly accepted Wilde's offer. The lower courts' analysis should be rejected as Wisconsin policy because they failed to examine which party delayed and complicated resolution. Kolupar was penalized for the two year delay before Wilde's first offer, a delay within Wilde's control.

Wilde admits Mr. Crivello conferred privately (although it claims innocently) with its counsel. (R. 130, 4, 6). Its appellate court brief at p. 29 claimed he was fact-finder/ special master under Sec. 805.17(2). If Mr. Crivello was a judicial official, he could not confer and testify like a partisan witness. Judge Cooper also learned information "intimated" in "discussions" (R. 129,72) with Mr. Crivello. This is a disturbing example of judicial decision-making with private discussions between defense counsel and Mr. Crivello, and information "intimated" in "discussions" between

Mr. Crivello and Judge Cooper. Similar procedures were disapproved in *Helmbrecht v. St. Paul Ins.*, 122 Wis. 2d 94, 362 N.W.2d 118 (1985). Judicial officials should not testify in cases in which they participated because it calls their impartiality into question, and unfairly prejudices the party testified against. Indeed, Judge Cooper was surprised Kolupar cross-examined Mr. Crivello (R. 128, 19, 20). Wilde also attempted to taint the process, engaging in a transparent move to negatively predispose Mr. Crivello against Kolupar and her attorneys (R. 128, 63-64).

III. KOLUPAR MADE A REASONABLE ATTEMPT TO SETTLE BEFORE LITIGATION, SHE TRIED TO INFORMALLY RESOLVE EVERY DISCOVERY ISSUE BEFORE RESORTING TO MOTIONS TO COMPEL AND SHE DID HER BEST TO RESOLVE THE CASE EARLY (BEFORE FEES BECAME TOO HIGH) THROUGH SETTLEMENT OFFERS AND HER WILLINGNESS TO MEDIATE.

Wilde gambled that its pre-hearing brief argument [that Sec. 218.01(9)(b)(1994) did not award fees to victims of auto dealer fraud] (R. 96, 4-6) would succeed. Wilde also gambled its herculean efforts at denial, delay and intimidation would force Kolupar to abandon her claim. Wilde's gamble failed. Wilde can adopt unsuccessful strategies, but it must pay a consumer's fees if they fail. For example, the scheduling order required mediation. Kolupar's attorney wrote in March 2001, to schedule it. Wilde's position (R. 129, 11)(R. 104, Exh. "F") threatened sanctions under *Jandrt v. Jerome Foods*,

Inc., 227 Wis. 2d 531, 597 N.W.2d 744 (1999). Wilde then filed late its fruitless summary judgment motion, creating delay (since mediation awaits dispositive motions). Fees and costs then were $15,589.50. (R. 103,4) (App. 18, 2). When mediation came, Wilde offered nothing.

Wilde argues at p. 14 that Kolupar's fees were reduced under *Aspen Services v. IT Corp.*, 220 Wis. 2d 491, 583, N.W.2d 849 (Ct. App. 1998) to "promote civility." But the trial court noted no incivility by Kolupar (R. 129, 52)and expressly did not rely on *Aspen* ("Judge Mawdsley's case out of Waukesha") to reduce fees since he found no wrongdoing. (R. 129, 73)(App. 9, 73).

Kolupar informally sought compliance with discovery requests before filing motions to compel. (Note letters seeking voluntary compliance)(R. 24,9)(R. 125,13, lines 3-5). By contrast, Wilde moved for a protective order to block Bradley Braun's deposition, its affidavit mis-stating discovery had closed as to him (R. 135,8-9). Wilde's counsel learned of her mistake before the resulting August 16, 2001 hearing, but pressed on with an unnecessary hearing(R. 135,8).

Similarly, Wilde's appellate court brief at 6-7, incorrectly argued Kolupar's brief misrepresented the facts in saying two discovery hearings were needed in September and November, 2000, before Wilde in December (R. 128, 26)produced

vehicle documents requested in July, violating an order to compel (R. 27).

In its brief at p. 11, Wilde again relies on Mr. Crivello's mistaken testimony that Kolupar was late in filing her fee invoice under an order requiring disclosure in "February" 2002. There was no such order (R. 127,13-14). Wilde had the invoice since mediation in fall of 2001 (R. 128, 6). Wilde declined an adjournment to cure any surprise. (R. 130, 3). Costs in the invoice are undisputed in the record.

Wilde at p. 1 repeats that Kolupar and Thompson had a "personal relationship," a statement refuted by its factual citation. Wilde's attorney asked Thompson if he had dated Kolupar and he said no. (R. 58,6).

Wilde emphasizes an excerpt from former referee Crivello's comments of July 17, 2001. While dramatic, Crivello later corrected himself. Mr. Crivello later testified that neither Wilde's attorney nor Kolupar's attorney had prepared orders as ordered on that occasion (R. 128, 13-16), because both were awaiting a transcript.

Wilde's responsive brief accuses not only Kolupar's counsel, but also Judge Fine of misrepresenting the record when Judge Fine (2003 WI App. 175 ¶ 26) noted Wilde questioned Kolupar's friend, Jamey Robbins, about Kolupar's employment as an exotic dancer. Wilde's brief denies this, inexplicably

suggesting misrepresentation or distortion by an appellate judge. Wilde repeated this behavior on the record (R. 128, 98)(R. 129, 54).

Wilde's arguments that Kolupar was uncivil and the trial court reduced her fee award on this basis are unsupported, and cannot justify an award of 10% of the fees required to achieve a full recovery for this teenage consumer.

CONCLUSION

Tammy Kolupar respectfully asks for an order awarding her the fees and expenses presented to the circuit court, and remanding for a determination of subsequent fees and costs under Sec. 218.01(9)(b)(1994), Stats.

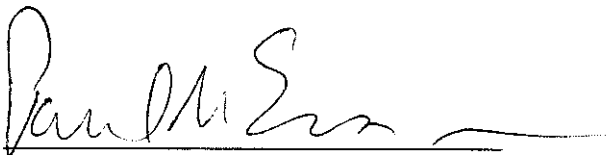
Respectfully submitted this 19th day of January, 2004.

LISKO & ERSPAMER, S.C.
Attorneys for Plaintiff-Appellant,
Tammy Kolupar

By: _____
Paul M. Erspamer
State Bar No. 1010824

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this brief is 13 pages.



Paul M. Erspamer

REPLY APPENDIX OF PLAINTIFF-APPELLANTS-PETITIONERS

INDEX TO REPLY APPENDIX

APPENDIX A

CRAMER, MULTHAUF & HAMMES, LLP
A WISCONSIN LIMITED LIABILITY PARTNERSHIP

ATTORNEYS AT LAW

Kathryn Sawyer Gutenkunst

SUITE 200
1601 EAST RACINE AVENUE
POST OFFICE BOX 558
WAUKESHA, WISCONSIN 53187-0558
TELEPHONE (262) 542-4278
FACSIMILE (262) 542-4270
E-MAIL ksg@cmhlaw.com

September 26, 2000

Paul M. Erspamer
Lisko & Erspamer, S.C.
W229 N1433 Westwood Drive
Waukesha, WI 53186-1183

RE: Tammy Kolupar v. Wilde Pontiac, Cadillac, Inc., et al.
Case No. 00 CV 002571

Dear Mr. Erspamer:

We enclose a copy of Wilde's employment file for Randall Thompson.

Very truly yours,

Kathryn Sawyer Gutenkunst

KSG:ts

Enclosures

cc: Jim Vanderveldt
Sharon Bloom

"I"
(4 pages)

Bloom
EXHIBIT NO. 2
2-12-01

WILDE PONTIAC Cadillac ISUZU
1603 E. MORELAND BLVD., WAUKESHA, WI 53186
(414) 542-0771

PONTIAC NEW CAR MANAGER

Randy Thompson

PAY PROGRAM

Effective : March 1st, 1992

Salary: $800.00 monthly salary paid $400.00 on the 15th and $400.00 on the last day of the month. Commission to be paid by the 10th of the following month.

Commission: 3% of New Pontiac Gross Excluding Fleet
3% of New Pontiac & Isuzu F&I Net
3% of Pontiac Program Car Gross for the month.

Randy Thompson

Iven Streckel

32

EMPLOYEE TERMINATION CHECK LIST

Employee Name Randy Thompson

Termination Date 4-25-94

Position NC Sales Manager

Termination Forms	Date Sent
Health Ins Extension (Cobra)	4-27-94
Dental Ins Extension (Cobra)	4-27-94
401k Termination	5-17-94
Salesperson's License Sent to MVD	5-4-94
Salesperson's Bonus Money	
Salesperson's Plate Fee	

Collected from Employee	Date Collected
Salesperson's License Plates	4-27-94
Salesperson's License	
All Keys Assigned to Employee	

Comments:

FINAL DEMO SHEET RECEIVED _____

Copies of All Forms Sent are Attached

DPU In + Out
DPU Mileage Verification

File in employee files

33

PAYROLL DEPARTMENT

EMPLOYEE NAME: Randy Thompson	HIRE DATE:
DEPARTMENT: New Car Managers	TERMINATION DATE: 4/25
START OR CHANGE OF PAY RATE:	CHANGE DATE:
SUPERVISOR: Joe Zanella	REGULARLY SCHEDULED HOURS: TO
LOCATED ON LOT: *(Circle One)* ~~Part Time~~ CAR CENTER Fawn BUDGET LOT TRUCK CENTER	*(Circle One)* FULL-TIME PART-TIME

COMMENTS: ~~Sales~~ Managers Didn't Show up for work 4/23/94 Sat
Didn't call In, Decided To Golf with Another Employee.
Not Performing ANY Managers Duties

REASON FOR TERMINATION SUB STANDARD Performance

ELIGIBLE FOR RE HIRE? With Extreme Reservations

DIS
Health
401K

APPENDIX B

MAR 30, 1994 F&I - DEAL WORKSHEET 4770

1 DEAL NO	19473	10 CASH DOWN	2000.00	19 TERM	36
2 DEAL DTE	03/30/94	11 DEPOSIT		20 PYMNTS/YR	12
3 STOCK NO		12 LIC FEE		21 DAYS	45
4 PRICE	8995.00	13 TITLE FEE	12.50	22 AOR	6.52
5 MSRP		14 LIEN FEE	4.00	23 APR	12.00
6 BALLOON		15 TIRE FEE		24 STATE TAX RTE	5.00
7 REBATE		16 OTHER FEES		25 COUNTY TAX RTE	
8 TRADE	8995.00	17 WARR PREM		26 MON PYMT %	
9 PAYOFF	10300.00	18 RUST PROOF		27 LUX TAX (Y/N)	
				28 ADJ.	

A=ADDL COMMANDS	L=CLEAR DEAL	X/X#=LEASE CONV	<F12>=CLOSE DEAL
CB/CB#=CRED BUR	N=ROLL PAYMENT	Y=ROLL GROSS	SH<F9>=SALES MGR REVIEW
D/D#=DESK DEALS	R=PER DAY COSTS	Z=MINI QUICK QUOTE	SH<F10>=DISP GROSSES
I/I#=INSURANCE	Q/Q#=BANK SELECT	<F10>=DEAL RECALL	<CTRL>I=MO PYMTS (INS)
J=DEAL REVIEW	W=LEASE COMPARISON	<F11>=STORE DEAL	<CTRL>O=MO PYMTS (TERM)

(LINE#)(M=MODIFY)(COMMAND)
SHIFT F1=FKEYS BANK=GMAC MONTHLY PYMT (10) 277.58

APPENDIX C

GMAC FINANCIAL SERVICES

10:00 AM

CUSTOMER'S STATEMENT—PLEASE PRINT

APPLICATION NUMBER

☐ Individual credit—applying for credit in your own name and relying on your own income or assets and not the income or assets of another person (except income or assets of a married wife/separate resident) as the basis for repayment of the credit requested.

Check Appropriate Box

☐ Joint Credit—applying for joint credit with another person. (Relationship to co-applicant, if any _____

☐ Individual Credit—applying for credit in your own name but relying on income from alimony, child support, or separate maintenance or on the income or assets of another person as the basis for repayment of the credit requested.

PRIMARY APPLICANT

PRINT FULL NAME: FIRST Tammy MIDDLE Lynn LAST Kolyer Sr. Jr. | SOC. SEC. NO./TIN 391 94 2254 | DATE OF BIRTH MO. 12 DAY 26 YR. 65 | HOME PHONE NO. 536-2

PRESENT ADDRESS: NUMBER AND STREET 1205 S. 93rd CITY West Allis COUNTY Milw STATE Wis ZIP CODE 53214 | LIVED THERE YEARS 7 MOS

RENT BY MO. ☐ LEASE ☐ OWN ☐ | LANDLORD OR MORTGAGE HOLDER NAME Linas R Kolyer | MO. PYMT. OR RENT $ 0

PREVIOUS HOME ADDRESS: NUMBER AND STREET _____ CITY _____ COUNTY _____ STATE _____ ZIP CODE _____ | LIVED THERE YEARS _____ MOS _____

EMPLOYED BY SELF ☐ OTHERS ☐ | NAME Barbara Tyme-Cummings Wal Lasers | BUSINESS ADDRESS, NUMBER AND STREET _____ CITY _____ STATE _____ | HOW LONG YEARS 2 MONTHS 2 | BUS. PHONE NO. 328-660

TRADE OR OCCUPATION Bell | SALARY OR WAGES $ 1200.— | NAME OF PREVIOUS EMPLOYER _____ ADDRESS _____ NO. YRS. _____

Alimony, child support, or separate maintenance income need not be revealed if you do not wish to have it considered as a basis for repaying this obligation

TYPE OF OTHER INCOME Vegas Club | SOURCE Whitefaces | MONTHLY AMOUNT $ 600.—

NAME AND ADDRESS OF PARENTS OR NEAREST RELATIVE NOT LIVING WITH ME | NAME _____ ADDRESS _____ | PHONE NO. _____ | RELATION _____

NAME AND ADDRESS OF PERSONAL FRIEND | NAME _____ ADDRESS _____ | PHONE NO. _____ | KNOWN LONG _____

BANK ACCOUNT | NAME OF BANK First Fraus Bank | BRANCH NAME AND CITY _____ | CHECKING ☐ SAVINGS ☐ NO ACCOUNT ☐ | CHECKING ACCOUNT NO. _____

LAST CAR FINANCED Ford Tasy | NAME OF CREDITOR _____ | BALANCE DUE OR DATE PAID _____ | TRADING IN THIS CAR? ☐ YES ☐

CREDIT REFERENCES OR PRESENT LIABILITY OBLIGATIONS. | INCLUDE FINANCE COMPANIES, BANKS, CREDIT CARDS, CHARGE ACCOUNTS..... INCLUDE NAMES OF APPLICANT IN WHICH CREDIT CAN BE VERIFIED, IF OTHER THAN SHOWN ABOVE.

NAME OF CREDITOR | ADDRESS | ACCOUNT NO.

THE CAR WILL BE REGISTERED IN NAME OF Tammy Lynn Kolyer | NUMBER AND STREET 1205 S 93rd St | CITY West Allis | STATE Wis | CERTIFIED DRIVING NO. _____

C/L TYPE | NEW ☐ USED ☒ | YEAR 85 | MODEL 6 | MAKE Mercedes

MODEL # 126 | DESCRIPTION 420SEL | MILEAGE _____

VIN _____ | SALESPERSON _____

1—W/C AIR CONDITIONING ☐ 2—SUNROOF ☐ 3—STEREO ☐
4—CRUISE ☐ 5—POWER WINDOWS ☐ 6—POWER SEATS ☐
7—FOUR WHEEL DRIVE ☐ 8—MANUAL TRANS. ☐ 9—ALUM./WIRE WHEELS ☐

OTHER (DESCRIBE) _____

TRADE-IN YEAR _____ MAKE Pontiac DESCRIPTION _____

TERM OF CONTRACT 36 MOS. | DEALER _____ | DEALER NO. _____

CASH PRICE (LINE 1 OF CONTRACT)	32,586.00
LESS: NET TRADE	
CASH	2500
REBATES (DESCRIBE)	
OTHER (DESCRIBE)	
TOTAL DOWNPAYMENT	2750
UNPAID BALANCE	
PLUS INSURANCE CHARGES	
OTHER CHARGES	
TOTAL AMOUNT FINANCED	
FAIRP $	
SPECIAL PROGRAM (FIRST TIME BUYER, COLLEGE GRAD, ETC.)	

8600 36 mos 12%

8600

CO-APPLICANT

PRINT FULL NAME: FIRST _____ MIDDLE _____ LAST _____ Sr. Jr. | SOC. SEC. NO./TIN 3/21/94 | DATE OF BIRTH MO. _____ DAY _____ YR. _____ | HOME PHONE NO. _____

PRESENT ADDRESS: NUMBER AND STREET _____ CITY _____ COUNTY _____ STATE _____ ZIP CODE _____ | LIVED THERE YEARS _____ MOS _____

RENT BY MO. ☐ LEASE ☐ OWN ☐ | LANDLORD OR MORTGAGE HOLDER NAME _____ | MO. PYMT. OR RENT $ _____

PREVIOUS HOME ADDRESS: NUMBER AND STREET _____ CITY _____ COUNTY _____ STATE _____ ZIP CODE _____ | LIVED THERE YEARS _____ MOS _____

EMPLOYED BY SELF ☐ OTHERS ☐ | NAME _____ | BUSINESS ADDRESS, NUMBER AND STREET _____ CITY _____ STATE _____ | HOW LONG YEARS _____ MONTHS _____ | BUS. PHONE NO. _____

TRADE OR OCCUPATION _____ | SALARY OR WAGES $ _____ | NAME OF PREVIOUS EMPLOYER _____ ADDRESS _____ NO. YRS. _____

Alimony, child support, or separate maintenance income need not be revealed if you do not wish to have it considered as a basis for repaying this obligation

TYPE OF OTHER INCOME _____ | SOURCE _____ | MONTHLY AMOUNT $ _____

BANK ACCOUNT | NAME OF BANK _____ | BRANCH NAME AND CITY _____ | CHECKING ☐ SAVINGS ☐ NO ACCOUNT ☐ | CHECKING ACCOUNT NO. _____

LAST CAR FINANCED | NAME OF CREDITOR _____ | BALANCE DUE OR DATE PAID _____ | TRADING IN THIS CAR? ☐ YES ☐ NO

CREDIT REFERENCES OR PRESENT LIABILITY OBLIGATIONS. | INCLUDE FINANCE COMPANIES, BANKS, CREDIT CARDS, CHARGE ACCOUNTS..... INCLUDE NAMES OF APPLICANT IN WHICH CREDIT CAN BE VERIFIED, IF OTHER THAN SHOWN ABOVE.

NAME OF CREDITOR | ADDRESS | ACCOUNT NO.

Automobile insurance is required for the full term of the Contract(s) on your car(s) against the hazards of fire, theft and accidental physical damage and GMAC. The policies issued by the insurance company will prescribe the terms and conditions. If the unpaid balance of cash price is disclosed YOU MAY CHOOSE THE PERSON THROUGH WHOM ANY INSURANCE IS OBTAINED.

Do you desire that the dealer arrange the required insurance coverage?

EXHIBIT 10

Initials

APPENDIX D

USED CAR INVENTORY

STOCK NO. 0189 | DATE IN 4-04-94 | YR. 93 | MAKE Pontiac | MODEL Sunbird

SERIAL NO. 1G2JC14H8P7500415 | FLOOR PLAN | DATE | NOTE NO. | CK NO 88372 | DATE PAID | COLOR Red

PREVIOUS OWNER Tammy Susan Kolupar
ADDRESS 1225 S 93 St
PHONE West Allis, WI
SALESMAN
MILEAGE 30,108

INVOICE NO. V#88372

SOLD TO Joan Kajis
ADDRESS 4207 Cherrywood Ln Brown Deer, WI 53209
PHONE (414) 365-0274
SALESMAN Cepling
INVOICE ~~35440~~ 37740
DATE 5-5-94

APPRAISAL AMOUNT 14500.00

INTERNALS

NO.	DATE	TYPE	AMT.
		Bruise	150.00
		Buy Fee (88)	150.00
PM1B5842	4/28	Safety	1433.93
57164	5/3	Windshield Rep.	9233.93 3300 9100
			935793
PM1B57360		painting Mold	24750
			~~962043~~
			960543

SALE AMT. 11495.00
LESS DISC 1.69500
NET SALE 9800.00
COST 960543
NET PROFIT 194.57
COMM 75.00
SALESMEN COST 845.43
SALESMEN GROSS PROF 145.43
SALESMEN COMM. 75.00

EXHIBIT 112

STATE OF WISCONSIN
IN THE SUPREME COURT
Appeal No. 02-1915
Circuit Court Case No. 00-CV-2571

TAMMY KOLUPAR,

Plaintiff-Appellant-Petitioner,

v.

WILDE PONTIAC, CADILLAC, INC.
and RANDALL THOMPSON,

Defendants-Respondents.

ON APPEAL FROM THE CIRCUIT COURT
OF MILWAUKEE COUNTY
HONORABLE THOMAS R. COOPER, PRESIDING

NON-PARTY BRIEF AND APPENDIX OF FAIRFIELD RESORTS, INC.

MICHAEL BEST & FRIEDRICH, LLP
Jon G. Furlow, State Bar No. 1020448
One South Pinckney Street
P. O. Box 1806
Madison, WI 53701-1806
Ph: (608) 257-3501
Fax: (608) 283-2275

Attorneys for Fairfield Resorts, Inc.

Dated: February 11, 2004

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

MISCELLANEOUS

STATEMENT OF INTEREST

Fairfield Resorts, Inc. is the largest independent timeshare company in the world and has three timeshare resorts located in Wisconsin. Fairfield is interested in this dispute because timeshare sales are regulated by the Wisconsin Timeshare Act which contains an attorney fee-shifting provision like the one before the Court. As set forth in Fairfield's motion for leave to file a non-party brief, Fairfield's interest in the proper application of these statutes arises because of timeshare litigation stemming from Fairfield's recent acquisition of the Peppertree resort in Wisconsin.

INTRODUCTION

This case arises against the backdrop of a long history in Wisconsin of protecting the rights of consumers through both legislation and judicial decisions such as *Shands v. Castovinci*, 115 Wis. 2d 352, 340 N.W.2d 506 (1985). A central feature of this legislation is the availability of fee shifting to insure that consumers have access to lawyers to bring claims that might otherwise not be economical to bring.

Fee shifting has led to increased consumer litigation where the client, without a concern about paying legal fees, has little reason to monitor or participate in the litigation decision making. The unintended result can be protracted litigation where lawyers, unchecked by client cost concerns and incentivized by fee shifting, eschew efforts to settle cases on a reasonable basis, engage in extensive discovery and refuse to reach reasonable compromise resolution of disputes during litigation.

The lower courts were right to conclude that this type of conduct was present in this case and justified a fee reduction.

ARGUMENT

I. FEE AWARDS MUST FURTHER THE PURPOSE TO PROTECT CONSUMERS, AND NOT CREATE INCENTIVES FOR OVERLITIGATION.

A fee award should serve the purpose of the fee shifting legislation to provide consumers with access to lawyers. This purpose is not put at risk when the court awards less than the full amount of fees requested because the lawyer overlitigated the case. *Riverside v. Rivera*, 477 U.S. 561, 580, 91 L. Ed.2d 466, 483, 106 S.Ct. 2686 (1986) ("Congress intended fee awards to be 'adequate to attract competent counsel, but . . .not produce windfalls to attorneys.' ")

A reasonable fee must balance of the need to provide fair compensation with the need to prevent litigation conduct that wastes resources:

> Waste is not in the public interest. The Congress that passed the Fair Debt Collection Practices Act in 1977 could hardly have wished to reward lawyers for doing nonproductive work and wasting their adversaries' time and the time of the courts as well. In directing the courts to award "reasonable" fees, on the contrary, Congress undoubtedly wished to ensure that the lawyer representing a successful plaintiff would receive a reasonable fee for work reasonably found necessary—nothing less, and nothing more.

Lee v. Thomas & Thomas, 19 F.3d 302, 306 (6th Cir. 1997). This balance furthers the goal for "the just, speedy and inexpensive determination of every action and proceeding." Wis. Stat. § 801.01(2). Limiting an award to "reasonable" fees provides an incentive to engage in reasonable settlement efforts and participate in alternative dispute resolution. Wis. Stat. § 802.12.

The trial court's fee award served this balance. The trial court was unambiguous that the "matter was over-tried." (Kolupar App. 1, ¶ 7.) The court of appeals concluded the case "ballooned into a morass of discovery disputes, ineffective communication, and general inefficiency." *Id.* at ¶ 5. Kolupar filed a "shot gun pleading", engaged in conduct resulting in sanctions, pursued discovery and evidentiary issues that were "overdone" and "grossly inflated" and overtried the case. (*Id.* at ¶¶ 7, 17.)

Reducing a fee award for overlitigation is common and appropriate. *See Pierce v. Norwick*, 202 Wis. 2d 587, 598, 550 N.W.2d 451 (Ct. App. 1996) ("[a]dversary positions have been strenuously pursued in the face of more than ample opportunities to resolve the conflict"); *Aspen Services, Inc. v. IT Corporation*, 220 Wis.2d 491, 583 N.W.2d 849 (Ct. App. 1998) (" '[a] plaintiff may not unnecessarily run up its legal bill in the expectation

that the breaching party will ultimately pick up the entire tab.' " quoting *Fidelity and Deposit Co. v. Krebs Engineers*, 859 F.2d 501, 506 (7th Cir. 1988)).

Reducing a fee award for overlitigation eliminates the unintended incentive to litigate without regard to cost by operating as a surrogate for a client who would not pay for overlitigation on an hourly basis. The risk of non-payment forces the lawyer being paid on an hourly basis to conduct the case in a reasonable fashion. This incentive disappears in a fee shifting case where a party believes that it has no need to be reasonable because it will recover its fees in the end. Reducing the fee award for overlitigation brings the proper incentive back into line.

Circuit Judge Evenson recognized how this phenomenon works in a fee shifting case:

> An additional observation that does not neatly fit into any of the above categories is the client control over a lawsuit. When a client is directly responsible for fees and costs, he or she has a significant voice in the matter. A client, when directly paying the attorney can weigh the legal cost against the potential return. Risk, cost and return are all part of an equation which serves as a realistic check and balance in the legal process. In a fee shifting case, particularly when fee recovery is evident, this system of checks and balances erodes. An attorney, when

> looking to the other side for payment, potentially loses the incentive to resolve small disputes knowing that payment is likely to be forthcoming. This case suggests that this process was in play here. It leads this court to the conclusion that aspects of the case were overlitigated when a more reasonable approach would have resolved the matter much more quickly.

(Fairfield App. 9.) For example, fee requests have been reduced when a consumer serves hundreds of interrogatories in a $10,000 case. (Fairfield App. 15-16.)[1]

The ABA Journal reported on similar conduct from a lawyer who handles consumer cases and boasts that he makes "arbitrary settlement demands" and piles up the fee award:

> In his remarks at the conference and in later interviews, he explained how the law works, described some of the unfair practices he has encountered and detailed his strategy for winning a case.
>
> Rubin makes no apologies for his tactics, despite his own admission that he relies on technical violations of the law to bring a case, makes arbitrary settlement demands irrespective

[1] The reverse is also true. The trial court would not reduce the fee if the defendant is the cause of the excessive litigation. But as set forth *infra*, assessing fault is something for the trial court to sort out.

> of damages and earns far more in attorneys' fees than his clients are entitled to collect.

Mark Hansen, *When Rubin Sues, Defendants Settle: Unscrupulous debt collectors pay the bills for New Mexico consumer lawyer*, 79 A.B.A.J. 28 (Jan. 1993). This strategy appeared to be at work here when Kolupar demanded $13,000, threatened triple damages, and then just before trial accepted Wilde's offer of about half of that amount, $6,600. (Kolupar App. 21.)

Allowing lawyers free rein to litigate to the hilt regardless of cost cannot be justified as a means to "level the playing field." This approach needlessly protracts litigation and tilts the playing field against the defendant. A good example is Kolupar's initial demand threatening to go to the media:

> I will leave it to you to assess the damage to Wilde Pontiac's goodwill and credibility when the local news media learns of a transaction in which an 18 year old is swindled by your sales manager who tells her she is buying a trade-in vehicle from your dealership, but leaves her with his own 9-year old, high-mileage sports car with defective brakes, a bent axle and an inoperative odometer.

(Kolupar App. 21.)

This Court should not reward this unreasonable approach with full fee awards. Consumer lawyers have significant leverage to force a defendant to settle on unreasonable terms by pursuing a litigation strategy that forces the defendant to choose between the lesser of two evils: incur significant litigation costs to raise legitimate defenses or to settle on unreasonable terms to save defense costs. The Seventh Circuit condemned this practice in consumer cases. *Mirabel v GMAC*, 576 F. 2d 729, 731 (7th Cir. 1978) ("The costs of these suits already forces many claims to settlement"); *see also Murphy v. Equifax Check Services, Inc.*, 35 F. Supp. 2d 200, 204 (D. Conn. 1999) ("It is apparently plaintiff's counsel's view that she has a right under the FDCPA to continue this action so as to increase her attorney's fees.")

The dissent is correct to be concerned about the availability of legal services if lawyers are not fairly compensated. (Kolupar App. 1, ¶ 25.) But that concern is misplaced in this case. Declining to compensate lawyers for overlitigation will not eliminate legal services for consumers. To the contrary, affirming the court of appeals will signal that lawyers have a duty to litigate fairly and efficiently, regardless of the source for payment of fees.

II. THE IMPORTANT ROLE OF THE TRIAL COURT IN DETERMINING A REASONABLE FEE MUST BE RESPECTED.

A. The Trial Court Is In The Best Position To Evaluate Reasonableness.

Much of Kolupar's briefing requests this court to resolve disputes over what did or did not occur at the trial court level. This Court should not accept this invitation because it encourages inappropriate appeals of factual matters and undermines the important role the trial court plays in the determination of a reasonable fee award.

This Court emphasized the importance of the trial court in *Standard Theatres v. Transportation Dept.*, 118 Wis. 2d 730, 349 N.W.2d 661 (1984) because the trial judge is most familiar with the litigation and is in the best position to evaluate the reasonable value of services provided during the case. *Id.* at 757 *quoting*, *Tesch v. Tesch*, 63 Wis. 2d 320, 335, 217 N.W.2d 647 (1974). The United States Supreme Court established this same rule in the seminal case of *Hensley v. Eckerhart*, 461 U.S. 424, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983) (". . . We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the

desirability of avoiding frequent appellate review of what essentially are factual matters.")[2]

This role is the same with findings by a discovery referee. Discovery is where many cases go awry. When they do, the discovery referee is in the best position to make judgments about fault based upon close contact with the litigants. The process worked well here where the discovery referee "was quite familiar with the discovery" and was "able to offer insight into the general demeanor of the attorneys and their efficiency, or lack thereof." (Kolupar App. 1, ¶ 13.) Allowing trial courts to rely on the discovery referee's conclusions will encourage litigants to conduct litigation in a reasonable fashion at all stages of a case, and not simply when they appear before the court.

Re-weighing facts and circumstances on appeal inevitably leads to a high risk of error. A good example is the dispute over references to the "club dancer" and "breast implants." Kolupar blames this on Wilde, while

[2] This Court has recognized an exception to the rule of deference "with respect to determinations of the value of legal services." *Fireman's Fund Ins. Co. v. Bradley Corporation*, 2003 WI 33, ¶ 67, 261 Wis. 2d 4, 42, 660 N.W.2d 666, 685 (2003). This exception was first established by this Court in *Will of Gudde,* 260 Wis. 79, 86, 49. N.W. 2d 906 (1951) to address the concern when a trial judge determines the value of legal services "basing the same upon the judge's own knowledge." *Id.* This exception should not be extended to include a *de novo* review of factual findings that are made at the trial court level based on record evidence and assessing the conduct of counsel.

Wilde shows that Kolupar's lawyers raised the subject in a deposition. This same rehashing of the trial court proceedings appears throughout the briefs. Kolupar reargues the circumstances to claim the trial court was in error, and Wilde-Pontiac responds one by one with the other side of the dispute. Since this Court was not present during the trial court proceedings, it is impossible to sort out from a cold appellate record what really occurred and how each event fit into the dynamic of the trial court proceedings.

This Court should not endorse an approach in fee determinations that creates another round of fee litigation by expanding the authority of the appellate courts to re-weigh the facts.

B. The Trial Court Need Not Expressly Explain Each Factor To Determine The Reasonable Fee.

A fee decision is necessarily an equitable judgment based on the specifics of the case and should not be reversed because it does not explain the application of each factor in SCR 20:1.5. The United States Supreme Court outlined the standard:

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.

Hensley, 401 U.S. at 436-37. This Court applied this approach in *First Wisconsin Nat. Bank v. Nicolaou*, 113 Wis. 2d 524, 538, 335 N.W.2d 390 (1983).

A mechanical application of the considerations in SCR 20:1.5 was not necessary where the excessive fees resulted from overlitigation. Still, the trial court considered many of the factors. (Kolupar App. 1, ¶ 17.) The trial court also agreed with Kolupar's central point – that a fee award must recognize the central purpose of the fee shifting statute to insure that "a little guy can take on a big guy." (*Id.*)

Contrary to Kolupar's suggestion, the fee award reflected the most important factor in determining a reasonable fee: the limited success achieved by Kolupar. *Hensley*, 401 U.S. at 440. Kolupar's original demand was for $13,000 which Kolupar threatened would be tripled under the odometer fraud statute for a total of $39,000. (Kolupar App. 21.) Wilde successfully defeated the triple damage threat by obtaining summary judgment on the odometer fraud claim. (R-App. 129.) Kolupar's ultimate recovery of $6,600 was less than 20% of the amounts claimed in the complaint which would have totaled $39,000, plus attorney's fees.

The reduced fee award properly reflected this limited success.

III. THE AMOUNT AT ISSUE MUST BE TAKEN INTO ACCOUNT TO FULLY EVALUATE WHETHER THE FEE REQUESTED IS REASONABLE.

The trial court was correct that the amount at stake is an appropriate factor to consider when determining a reasonable attorney fee award. This factor is explicitly included in SCR 20:1.5 that expressly directs that "[t]he amount involved" is a factor to be considered. Other statutes such as the Wisconsin Consumer Act also direct that the amounts involved be considered. Wis. Stat. § 425.308(2)(c).

This Court has long held that the amount of money or value of the property affected are proper factors to consider when determining reasonable attorneys fees. *Fireman's Fund Ins. Co. v. Bradley Corporation,* 2003 WI 33, ¶ 67, 261 Wis. 2d 4, 42, 660 N.W.2d 666, 685 (2003); *Three & One Co. v. Geilfuss*, 178 Wis. 2d 400, 415, 504 N.W.2d 393 (Ct. App. 1993) citing *Touchett v. E.Z. Paintr Corp.,* 14 Wis. 2d 479, 488, 111 N.W.2d 419, 424 (1961).

Considering the amount at issue does not mean that the trial court adopted a proportionality standard. All the trial court did was determine that given the amount at issue, Kolupar pursued an unreasonable litigation strategy that justified a reduction in fees. Far from making a proportional

award, the trial court adhered to the direction to "ensure that attorneys are compensated only for time *reasonably expended* on a case." *Riverside*, 477 U.S. at 580 (emphasis in original).

Kolupar cannot avoid this conclusion by arguing that there was no finding that its discovery was unnecessary. With the wide scope of discovery in civil litigation, lawyers can conduct almost unlimited discovery and later justify it as within the broad scope of discovery allowed by the rules. But that does not make the discovery reasonable in the context of the case. Consumer lawyers are not exempt from making the same litigation choices that lawyer representing an hourly client must face. Discovery must be carefully tailored to seek what is reasonably necessary under the circumstances of the case.

There is no reason to compensate for excessive discovery in a fee shifting case when, in the hourly context, the paying client would demand a discount.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Dated this 11th day of February, 2004.

Respectfully submitted,

MICHAEL BEST & FRIEDRICH LLP

By _____
Jon G. Furlow
State Bar No. 1020448

Michael Best & Friedrich LLP
One South Pinckney Street
P. O. Box 1806
Madison, WI 53701-1806
(608) 257-3501
Fax: (608) 283-2275

CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,989 words.

Dated this 11th day of February, 2004.

MICHAEL BEST & FRIEDRICH LLP

By: _____
Jon G. Furlow

STATE OF WISCONSIN
IN THE SUPREME COURT
Appeal No. 02-1915
Circuit Court Case No. 00-CV-2571

TAMMY KOLUPAR,

Plaintiff-Appellant-Petitioner,

v.

WILDE PONTIAC, CADILLAC, INC.
and RANDALL THOMPSON,

Defendants-Respondents.

ON APPEAL FROM THE CIRCUIT COURT
OF MILWAUKEE COUNTY
HONORABLE THOMAS R. COOPER, PRESIDING

APPENDIX OF NON-PARTY FAIRFIELD RESORTS, INC.

MICHAEL BEST & FRIEDRICH, LLP
Jon G. Furlow, State Bar No. 1020448
One South Pinckney Street
P. O. Box 1806
Madison, WI 53701-1806
Ph: (608) 257-3501
Fax: (608) 283-2275

Attorneys for Fairfield Resorts, Inc.

Dated: February 11, 2004

TABLE OF CONTENTS

Page

STATE OF WISCONSIN CIRCUIT COURT SAUK COUNTY

SEAN DEGUIRE
and JEAN DEGUIRE,

Plaintiffs,

Vs.

PEPPERTREE RESORT VILLAS, INC., et al,

Case No. 00CV298

Defendants.

MEMORANDUM DECISION - ATTORNEYS FEES AND COSTS

Background Facts

Attorneys fees and costs are the final issue for resolution in this lengthy and contentious litigation. The underlying facts are quite straightforward. Plaintiffs purchased a timeshare condominium from defendants Peppertree. The individual defendants were involved in aspects of the sales transaction. After purchase, plaintiffs sued seeking cancellation of the contract, monetary damages and other relief. This case is one of a multitude of cases brought in various Wisconsin counties against the corporate defendants, Peppertree. The principal case has now settled with plaintiffs receiving a $6000 payment, cancellation of the contract, a cleansing of their credit record and other considerations. Plaintiffs' counsel has made a request for attorneys fees of $120,332.50 and costs of $9,124.42. The fees and costs issue has been extensively briefed and argued in those briefs.

Decision

In most litigation the so-called "American Rule" applies. This rule provides that each litigant generally pays his or her own litigation fees and costs. An exception to the rule has been statutorily created where a party prevails on certain causes of action. These exceptions are referred to as fee-shifting statutes and the ones applicable to this litigation are §§100.171, 100.18 and 100.20, Unfair Trade Practices, §425.308, Wisconsin Consumer Act and §707.57, Wisconsin Timeshare Act.

The threshold question under the fee-shifting statutes is whether a party is the prevailing party. If so, once a party does prevail under one of these statutes, an award of attorneys fees is mandatory. First Wisconsin Nat. Bank v. Nicolaou, 113 Wis.2d 524, 536, 335 N.W.2d 390 (1983). A party need not prevail on all claims in order to be a prevailing party. The statutes are to be liberally administered to put the aggrieved party in as good a position as if the creditor had complied with the law. Footville State Bank v. Harvell, 146 Wis.2d 524, 539, 432 N.W.2d 122 (Ct.App. 1988). Adequate awards of attorneys fees are necessary to carry out the policies of the statutes. Id at p. 539. Some of the general policies behind these statutes are to encourage injured parties to bring actions to enforce legal rights, to act as a "private attorney general," to deter impermissible conduct of parties and to provide a necessary backdrop to the state's enforcement powers. Shands v. Castrovinci, 115 Wis.2d 352, 340 N.W.2d 506 (1983). These

policies recognize that absent the ability to recover reasonable attorneys fees many smaller claims would not be privately enforced thus providing little deterrence or threat to offenders. The policy also recognizes that the attorney general cannot reasonably prosecute all claimed statutory and administrative code violations.

The burden of proof lies with the attorney submitting the fee request to prove the reasonableness of the fee when it is questioned. Standard Theatres v. Transportation Department, 118 Wis.2d 730, 748, 349 N.W.2d 661 (1984). Reasonableness involves a discretionary determination by the court. Id at p. 747. A proper exercise of discretion employs a logical rationale based on the appropriate legal principles and facts of the case. Chmill v. Friendly For-Mercury, 154 Wis.2d 407, 412, 453 N.W.2d 197 (Ct.App. 1989). The court has the inherent authority to determine whether attorneys fees are reasonable and to refuse to enforce them if they are not. City of Sun Prairie v. Davis, 226 Wis.2d 738, 749, 595 N.W.2d 635 (1998).

There is no single factor or set of factors that establish what is reasonable or how reasonableness is to be determined. Cases from Wisconsin and various jurisdictions, including federal courts, have been cited as containing factors this court should consider in its fee determination. Section 425.308(2), Wis. Stats., sets for factors a court may consider in determining the reasonableness of attorneys fees. The court need not consider all factors nor is the list necessarily exclusive. The use of the discretionary "may" in the statute suggests that not all categories

must be given equal weight. Some factors may be much more significant in a particular instance while others may be only peripherally applicable. The list of considerations also suggests that the determination of reasonableness is more than an arithmetic exercise of multiplying time spent by an hourly rate.

The statutory factors of §425.308(2) are:

(a) The time and labor required, the novelty and difficulty, the questions involved and the skill requisite properly to conduct the cause;
(b) The customary charges of the bar for similar services;
(c) The amount involved in the controversy and the benefit resulting to the client or clients from the services;
(d) The contingency or the certainty of the compensation;
(e) The character of the employment, whether casual or for an established and constant client; and
(f) The amount of the costs and expenses reasonably advanced by the attorney in the prosecution or defense of the action.

Pierce v. Norwick, 202 Wis.2d 587, 550 N.W.2d 451 (Ct.App. 1996), at p. 597, stated the following for consideration by the court:

> Among the factors to be considered by courts when determining attorney's fees are the amount and type of services rendered, the labor, time and trouble involved, the character and importance of the litigation, the professional skill and experience called for, the standing of the attorney, the general ability of the client to pay and the pecuniary benefit derived.

Plaintiffs cite the court to Hensley v. Eckerhart, 461 U.S. 424 (1983), a United States Supreme Court case which approved a method of calculating fees starting with the lodestar method, basic hours times hourly rate, which is then adjusted up or down according to the following twelve factors:

(1) the time and labor required;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to perform the legal service properly;

(4) the preclusion of employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

Suffice it to say that many factors come into play in determining the reasonableness of a request for attorneys fees. These factors are to be weighed by the court in determining what is reasonable under the circumstances of the case.

In this case the plaintiffs fee request exceeds $120,000. The question is whether this sum is reasonable. Reasonableness is a fluid and subjective concept. Different persons can disagree upon whether a particular act is reasonable or not. The concept seems simple but its application to a set of facts is frequently, as in this case, subject to debate. Considering the request as a whole under the circumstances of this case leads to the conclusion that the claim is not reasonable. The basis for this conclusion can be best addressed using the factors of §425.308(2), as a guide. The first consideration is:

(a) The time and labor required, the novelty and difficulty, the questions involved and the skill requisite properly to conduct the cause.

This case was unique in many ways but not so in others. Many claims were based upon violations of the Wisconsin timeshare laws and consumer act. Several issues had no helpful precedent in the reported cases. Skill and knowledge of the fine points of both statutes were required. On the other hand, this case was not isolated. While this case was being litigated there were numerous other cases pending in various counties on the same

or similar issues.[1] Because of the number of other pending cases, even though each presumably had its individual idiosyncrasies, there was sufficient similarity to involve economies of scale relative to case preparation, pleadings, discovery and briefing on the multitude of issues presented.

The skill of plaintiffs' attorney in this case type was evident. She was well prepared and presented her position aggressively. On the other hand, however, given the nature of the case as it developed, many activities exceeded what seemed to be reasonable. The litigation was extremely contentious and acrimonious. The operative word in both the statute and cases cited is time and labor required.

While conceding that several issues raised by the pleadings were novel, many of the facts underlying the various claims were readily established. Defendants Peppertree had been subject to investigation and litigation by the state which provided a framework for this and the related cases. Many of the legal issues paralleled those of companion lawsuits. Thus while the case was different from the ordinary, it was not different to the extent that the fee request suggests. This appears to be a case of overlitigation, however, as pointed out later in this decision, the blame does not rest solely with plaintiffs.

The second statutory consideration is:

(b) The customary charges of the bar for similar services;

Other than the influx of cases brought against defendant Peppertree within the last few years there have been few similar cases thus making it difficult to establish a customary charge for a case of this type. There have, however, been numerous contract cases wherein breach is alleged and rescission or cancellation is claimed. There is also a

[1] In some instances counsel have cited the court to other pending cases and even provided materials from those cases in support of their positions.

significant volume of litigation involving unfair trade practices. None of these, even though involving greater amounts of money, have come anywhere near in fees what plaintiff claims in this case. While conceding that this case did involve more than a simple contract the issues and complexity do not warrant the fees requested.

One must also look at the broad picture and perspective when assessing this case. As defense counsel has pointed out, a State Bar of Wisconsin survey would indicate that sole practitioners such as plaintiffs counsel generally earn significantly less that what is claimed here for one case if one uses the hours times rate approach. Additionally, in Sauk County public defenders appoint counsel at the rate of about $50 per hour. Private counsel are paid $65.00 per hour on court appointments in criminal, juvenile and related matters. The Supreme Court rate is $70 per hour. Most fee requests in Sauk County cases cite an hourly rate in the $100-$125 range. While these amounts do not establish that these rates should be applied, they do provide a perspective of the legal culture and what would be reasonable in certain circumstances.

The third statutory factor is:

(c) The amount involved in the controversy and the benefit resulting to the client or clients from the services.

It is upon this factor that a great deal of weight is being placed. The amount involved in the controversy is relatively small. The monetary settlement was $6000, the contract was cancelled and adverse credit information was expunged from plaintiffs' record. The original amount claimed by plaintiffs was less than the final settlement award. Even though in this respect plaintiffs prevailed on the major issues of their lawsuit, common sense and experience suggest that all of these factors coupled with the

difficulty of the suit fail to establish that $120,000, some twenty times the recovery amount, in fees was reasonable.

Statutory factor four is:

(d) The contingency or the certainty of the compensation.

Clearly at the outset of the case the certainty of compensation to plaintiffs was somewhat clouded. As the case progressed, however, those clouds lifted as it became evident that there were statutory violations by defendants including violations of prior court orders. At this time compensation became more certain as the fee-shifting statutes were clearly applicable. Additionally, because the amount in controversy, if a breach of contract was established was small, there would be little chance that plaintiffs themselves could pay substantial fees.

The fifth statutory factor is:

(e) The character of the employment, whether casual or for established and constant client.

Plaintiffs' counsel in her briefing indicates some other work done by or on behalf of plaintiffs. There is no suggestion that such work has been or would continue on a long-term basis. The nature of this claim as well as the prior claims suggest that the attorney-client relationship would not be long-term or particularly lucrative in the future. She also indicates in her affidavit that substantial other work was passed up so that this case could be litigated and this factor must be considered and weighed.

The last statutory factor of §425.308(2) is:

(f) The amount of the costs and expenses reasonably advanced by the attorney in the prosecution or defense of the action.

Counsel for the plaintiff essentially carried the cost of the lawsuit during its pendency and advanced the costs of litigation which are substantial. Many of the costs relate to travel expenses during the discovery process. To the extent that such costs were advanced counsel certainly carried risk in the event that the suit failed to provide recovery.

An additional observation that does not neatly fit into any of the above categories is the client control over a lawsuit. When a client is directly responsible for fees and costs, he or she has a significant voice in the matter. A client, when directly paying the attorney can weigh the legal cost against the potential return. Risk, cost and return are all part of an equation which serves as a realistic check and balance in the legal process. In a fee shifting case, particularly when fee recovery is evident, this system of checks and balances erodes. An attorney, when looking to the other side for payment, potentially loses the incentive to resolve small disputes knowing that payment is likely to be forthcoming. This case suggests that this process was in play here. It leads this court to the conclusion that aspects of the case were overlitigated when a more reasonable approach would have resolved the matter much more quickly.

As indicated above, reasonableness is both a fluid and subjective concept. Obviously many factors come into play in any lawsuit and this one certainly was no exception. A trial court is given discretion in setting attorneys fees because it sees first hand large volumes of litigation of many types. The trial court is generally familiar with the practice of the bar and of what occurs in its courts.

The court determines that the sum of $35,000 would represent a fair and reasonable award of attorneys fees in this case, however this is subject to adjustment.

This determination is made by placing significant weight upon the time that would normally be required in a case such as this. It also takes into account the skill and experience of counsel as well as the novelty and difficulty of the issues presented. The results of the case certainly factor in as does counsel's foregoing other employment.

As indicated the sum of $35,000 is subject to adjustment. The adjustment is necessary because defendants certainly, by their actions, have increased the time required to prepare and resolve this case. This litigation was acrimonious and defendants stubbornly resisted plaintiffs' efforts thus increasing the time required to prepare the case. Individual defendants did not cooperate in discovery matters. Both parties could easily have settled this case many months ago at significantly less cost but chose not to. Both counsel accuse the other of being unreasonable and both counsel are right and must share the blame. Consequently, the court believes that an additional $20,000 in fees should be awarded to plaintiffs due to defendants' overall posture in the case and the additional work required by it.

Plainitffs are awarded attorneys fees totaling $55,000 together with costs of $9,124.42 which are found to be reasonable. In addition, plaintiffs are awarded any and all attorneys fees ordered by the special master.

The documents necessary to conclude this matter are to be filed within 30 days.

Dated this 31 day of October, 2002.

BY THE COURT:

James Evenson
Circuit Judge

When Rubin Sues, Defendants Settl

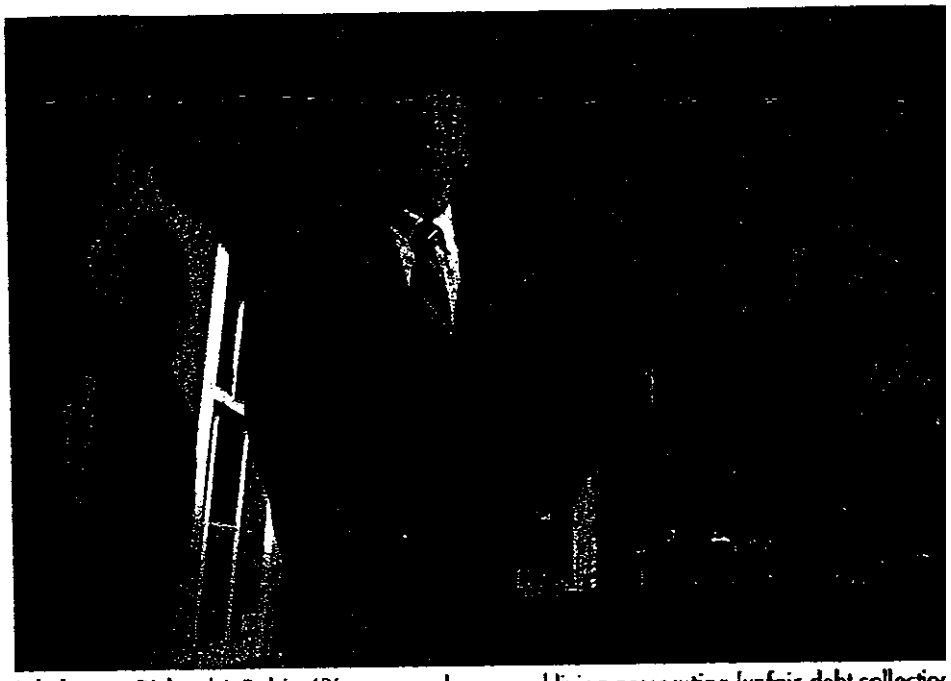
Unscrupulous debt collectors pay the bills for New Mexico consumer lawy

ABAJ/KI

Richard J. Rubin is the first to admit he's got a good thing going.

The 44-year-old Santa Fe, N.M., lawyer has turned his solo firm into a boutique practice that handles the cases of people who have been hounded by abusive debt collectors.

The work is dependable, the law under which he operates is pretty straightforward and the financial rewards, for client and lawyer alike, make it all worthwhile, Rubin says.



Solo lawyer Richard J. Rubin: "You can make a good living prosecuting [unfair debt collectior

Money to be Made

"I'm here to tell you, you can make a good living prosecuting these cases," Rubin told consumer rights lawyers gathered for an October conference in Boston. "It's a lose-lose situation for them. That's why these cases are so doable."

Rubin refused to say how much he makes, but he acknowledged later that he probably earns more than the average solo practitioner in New Mexico. "I'm not making the kind of money a successful [personal injury] lawyer makes, but then, who does?" he said.

By his own account, Rubin is one of only a handful of private lawyers in the country who handle consumer claims against abusive debt collectors under the federal Fair Debt Collection Practices Act.

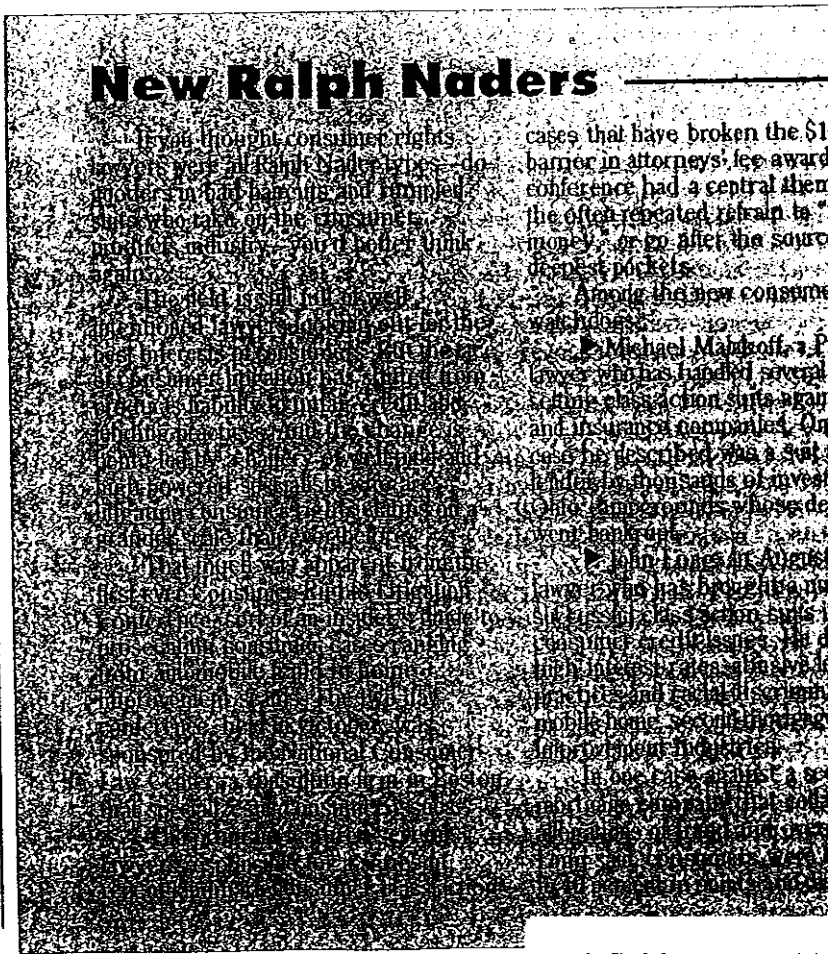
In his remarks at the conference and in later interviews, he explained how the law works, described some of the unfair practices he has encountered and detailed his strategy for winning a case.

Rubin makes no apologies for his tactics, despite his own admission that he relies on technical violations of the law to bring a case, makes arbitrary settlement demands irrespective of damages and earns far more in attorneys' fees than his clients are entitled to collect.

"This is what Congress intended as a response to an industry that was certified as being out of control 15 years ago," he said.

"The only thing the last 15 years have proved is that it's still out of control."

Still, his presentation struck the only apparently discordant note at the consumer rights conference, particularly among the smatte defense lawyers in the roo



New Ralph Naders

If you thought consumer rights lawyers were all Ralph Nader-type do-gooders in white hats and armed with subpoenas, you'd better think again.

The debt is still all yours, but the [illegible] best interests in collection [illegible]

cases that have broken the $1 barrier in attorneys' fee award conference had a central then the often-repeated refrain to money, or go after the sourc deepest pockets.

Among the new consume watchdogs:

▶ Michael Maddoff, a P lawyer who has handled several class-action suits again and its various companies. On case he described was a suit [illegible] thousands of inves [illegible] companies whose de went bankrupt.

▶ John Jones of Augus lawyer who has brought a n suits against [illegible] consumer credit agencies. He [illegible] high-interest [illegible] and [illegible] mobile home [illegible]

sounds like extortion," said one attendee who did not want to be identified. "There's no defense for what he's saying."

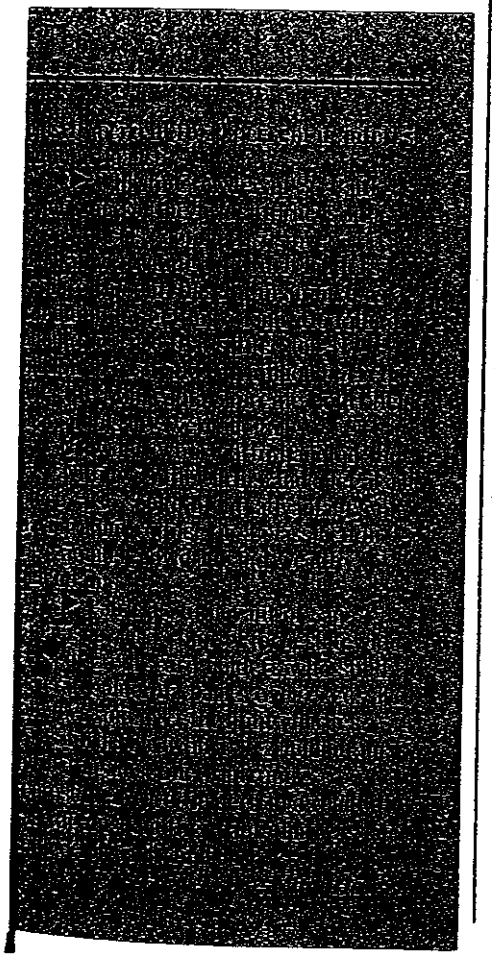
To begin with, Rubin responded, the act clearly defines what constitutes reasonable and unreasonable conduct. Any debt collector who doesn't want to get sued for violating the law need only comply with those specific provisions, he said.

Besides, Rubin said, he never solicits clients. Debtors who believe they've been mistreated by a bill collector must come to him. And the mere fact that so many do, even while acknowledging that they owe the debt, indicates how widespread the abuses are, he said.

Furthermore, Rubin said, he only takes the worst cases. He is currently representing a woman who tried to commit suicide after a bill collector called her at work and threatened to have her arrested if she didn't make good on a $212 bounced check.

Moreover, it was Congress that provided the means for private enforcement of the act by allowing for the recovery of reasonable attorneys' fees by consumers when it passed the legislation in 1977, Rubin said.

And while the law limits consumers to statutory damages of $1,000, the courts have set a standard for attorneys' fee awards as the prevailing hourly rate in a given market multiplied by the number of hours reasonably spent on a case, he said. The courts also have held that the amount of the underlying debt has no bearing on the formula for awarding attorneys' fees, he added.



Trial-Free Decade

Ultimately, Rubin said, it is the debt collector's decision whether to settle a case, even though he does his best to persuade them that it probably is in their best interest. Usually, all it takes is an understanding tha if the plaintiff succeeds in estab lishing a single violation of the law the defendant has nothing to gai and everything to lose, he said.

The approach seems to be work ing. Rubin said he hasn't been t trial on a claim against a deb collector since 1981. About 75 to 8 percent of the cases he files ar settled before the complaint has ever been answered, he said. And h claimed that the great majority o claims are settled at his standing offer, which is typically $7,500.

—Mark Hanser

The Facts...

4, The only law directory to have an information-sharing relationship with the IBA, ABA and CBA.

3, The only directory to maintain a peer group rating system that is widely respected by the legal community.

2, The only directory updated year-round via personal visits, a toll-free hotline, mail and input from state bar associations.

MARTINDALE-HUBBELL
125 Years of Service to the Legal Profession

STATE OF WISCONSIN CIRCUIT COURT BRANCH 9 DANE COUNTY

JOSEPH KUEHN and
JANE KUEHN,

Plaintiffs,

Case No. 99 CV 2941

vs.

PEPPERTREE RESORT VILLAS, INC., et al.,

Defendants,

DECISION

This matter is before the Court to determine an award of attorney fees in this action. The underlying action involved the Plaintiffs who purchased a timeshare from the Defendants and subsequently brought this action alleging various violations of the Wisconsin Consumer Act and Chapter 707. The Plaintiff prevailed on various counts involving both statutes in their motion for summary judgment. The Defendant is not asserting that attorney fees should not be awarded, but it is the amount that is in dispute. The Plaintiff's recovered $10,750.00 in damages in this action.

Plaintiff's counsel seeks fees at a billing rate of $200.00 per hour for 137.3 hours spent on this case, totaling $27,460.00, plus costs of $1,419.59. The costs pose no problem and they are awarded. The more difficult issue is what amount of reasonable attorney fees should be awarded under the facts and circumstances of this litigation. There are a number of standards, which both parties cite which the Court must look to in making this determination.

Sec. 425.308(2) stats. Provides:

a. The time and labor required, the novelty and difficulty, the questions involved and the skill requisite properly to conduct the cause;

b. The customary charges of the bar for similar services;
c. The amount involved in the controversy and the benefit resulting to the client or clients from the services;
d. The contingency or the certainty of the compensation;
e. The character of the employment, whether casual or for an established and constant client; and
f. The amount of the costs and expenses reasonably advanced by the attorney in the prosecution or defense of the action.

In Hensley v. Eckerhart, 461 U.S. 424 (1983) the Court considered the following factors:

a. The time and labor required;
b. The novelty and difficulty of the questions;
c. The skill requisite to perform the legal service properly;
d. The preclusion of employment by the attorney due to acceptance of the case;
e. The customary fee;
f. Whether the fee is fixed or contingent;
g. Time limitations imposed by the client;
h. The amount involved an the results obtained;
i. The experience reputation, and ability of the attorneys;
j. The "undesirability" of the case;
k. The nature and length of the professional relationship with the client; and
l. Awards in similar cases.

Finally, SCR 20:1.5 provides:

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) The fee customarily charged in the locality for similar legal services;
(4) The amount involved and the results obtained;
(5) The time limitations imposed by the client or by the circumstances;
(6) The nature and length of the professional relationship with the client;
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) Whether the fee is fixed or contingent.

Plaintiff's counsel additionally argues under the theory of consumer statutes, awarding fees, she is acting in the capacity of a "private attorney general" seeking remedies provided by the statutes, citing Shands v. Castovinci, 115 Wis.2d 352 (1983). Shands involved a small claims action for a rent deposit improperly withheld in violation of the code for which the tenant recovered and was awarded attorney fees. The Court stated at p. 358:

> Second, the tenant who sues under the statute acts as a "private attorney general" to enforce the tenants' rights set forth in the administrative regulations. Thus, the individual tenant not only enforces his or her individual rights, but the aggregate effect of individual suits enforces the public's rights.

The Court discounts this factor in this case based upon the facts and circumstances. The Wisconsin Department of Justice did act in this and related matters. Justice against Peppertree commenced two different actions. Large forfeitures were paid by the Defendant and funds were escrowed with Justice and a mechanism provided where consumers involved with the Defendant could file their claims for provable and related damages and be paid. The Attorney General did act to protect the public interest and the Plaintiffs' counsel action on this account is de minimus.

The Court also takes into account the troubled history of the litigation involving Peppertree. There were multiple actions involving hundreds of parties in courts in three different counties. Initially, Peppertree was not forthcoming in terms of discovery and process. Reportedly, the relationship between different counsel and former counsel was strained. The judges appointed a special referee, the Honorable P. Charles Jones, to handle the discovery issues for all pending cases.

The other side of the coin is that the Court finds the case was over litigated. Many of the basic facts, which proved violations of the code, were evident and present from the beginning. The need for hundreds of written interrogatories by the Plaintiffs is not apparent. As a result of the

Court's experience in this matter, the Court has changed its standard scheduling order to limit written interrogatories to 50, including subparts in all civil actions.

The standard of result and outcome does not support the Plaintiff's counsel demand for attorney fees. If the Plaintiffs had availed themselves to settlement procedure established by the Department of Justice, they could have recovered nearly as much as the offer of judgment which they accepted.

The Court does not question the accuracy of the account of the hours the Plaintiff's counsel spent and submitted. And the Courts decision on fees is not a reflection on her integrity. Based upon the record, the Court will not award fees at the $200.00 per hour rate. Rather then try to determine what hours spent were necessary or not, the Court chooses to make it awarded at a reduced rate. From the Courts experience, it is aware of attorneys who take Public Defender appointments for the $40.00 per hour. Court appointed counsel who are paid as counsel or guardian ad litems by the county receive $70.00 per hour. The Court is not insensitive to the expenses and overhead of private practioner either. All things considered the Court finds it reasonable to fix the hourly rate at $100.00 per hour and award $13,730.00 plus costs of $1,419.59 and orders the Defendant to pay this amount within thirty days of the date of this decision.

Dated this 15 day of January 2003.

BY THE COURT:

Gerald C. Nichol, Judge
Circuit Court Branch 9

IN THE SUPREME COURT OF WISCONSIN

Tammy Kolupar,

Plaintiff-Appellant-Petitioner,

v.

Appeal No. 02-1915
Trial Court Case No. 00-CV-2571

Wilde Pontiac Cadillac, Inc. and Randal Thompson,

Defendants-Respondents.

Brief of Amicus Curiae

Appeal From The Milwaukee County Circuit Court
The Honorable Thomas R. Cooper Presiding

De Vonna Joy
SBN 1018939
Consumer Justice Law Center
P.O. Box 51
Big Bend, WI 53103-0051
(262) 662-3982

Gwendolyn G. Connolly
SBN 1022125
Law Office of Gwendolyn G. Connolly
826 N. Plankinton, Suite 600
Milwaukee, WI 53203
(414) 347-9988

Table of Contents

Table of Authorities

Cases

Statutes

I. The Court Erroneously Found Plaintiff "Overpled" Her Case.

Plaintiff alleged five claims for relief. In the scant reasoning articulated by the trial court for reducing plaintiff's attorney's fees, Judge Cooper stated:

> There is no question this case was over-tried. Discovery was over -- well over-done. It was over-plead right from the get-go on the complaint. There was the shotgun pleading where everything was plead against Wilde short of conquering Europe during World War II.

(R. 129; Transcript of 5/14/02 Hearing: 72:6-10).

If a litigant has five valid claims for relief, courts have no authority to diminish fees simply because plaintiff pled them all. Although another attorney might choose to bring fewer claims, it is not a *mistake* to bring all five. Certainly the plaintiff should not be penalized simply because she proceeds under all viable legal theories available to her. Indeed, because each claim was *different,* each claim necessarily has distinct elements and requirements of proof.

Plaintiffs cannot be certain at the outset whether they will prevail on a particular element or theory. Likewise, plaintiffs

cannot know before filing the complaint which allegations, if any, defendant will admit. Accordingly, plaintiffs should not be required to guess which claims might succeed.

Litigants commonly plead multiple theories where applicable and justified by the facts. Ms. Kolupar's fees should not be diminished simply because she broadly pled several legal theories recognized under the law. *Kolupar* creates a chilling effect for future litigants, whose counsel may forego legitimate claims in relatively smaller cases out of fear that they will be accused of "overpleading," even when those claims succeed.

Had Ms. Kolupar brought non-meritorious or unsuccessful claims, the court could properly diminish fees related to time spent pursuing those claims. Notably, the court did not make that finding. Rather, the trial court merely opined that plaintiff "overpled" her complaint simply by bringing multiple claims. This was error.

The trial court essentially penalized Ms. Kolupar for pleading multiple claims. This decision is an erroneous exercise of discretion, because it creates heightened pleading rules in fee-

shifting cases. Had plaintiff brought *frivolous* claims, she not only would receive no attorney's fees, she would be subject to the sanctions of § 814.025, Wis. Stats. But in *non*-fee-shifting cases, there is no penalty for pleading multiple *meritorious* claims. *Kolupar* sets up a separate set of rules where plaintiffs can have legally cognizable claims, but dare not plead them, lest they be penalized for doing so.

II. There Was No Factual Basis Articulated For Finding That Plaintiff "Overtried" Her Case.

The lodestar method for determining fees is discussed in detail in other *amici* briefs and will not be repeated here. Unfortunately, the trial court did not apply the lodestar method and made no factual findings to support lowering fees and costs from approximately $53,000 to $15,000.[1] The court failed to employ any analysis related to the time evidence submitted.

Instead, the court simply adopted an arbitrary number suggested by defense counsel, which in turn was suggested by

---

[1] The trial court failed to separate fees from costs in its award. Subtracting the amount of costs (about $12,000) from the $15,000, plaintiff was awarded only approximately $3,000 of the $41,000 she incurred in attorney's fees.

the discovery referee, who was involved in the case a mere four months of fifteen months. The circuit court abdicated its duty by merely rubber-stamping the discovery referee without any independent analysis.

The court opined: "There is no question this case was over-tried. Discovery was over -- well over-done...." (R. 129; Transcript of 5/14/02 Hearing: 72:6-7) The problem, however, is that the court never articulated what supposedly was "over-tried" or "over-done" in the case. The court never claimed any discovery request or deposition was unnecessary or irrelevant.[2]

Notably, the only specific examples of what caused attorney's fees to escalate were proffered by Judge Ralph Adam Fine in his dissenting appellate opinion. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2003 WI App 175 ¶¶ 26, 266 Wis. 2d

---

2 The only criticism of this nature was leveled against ***defendant*** by Judge Ralph Adam Fine. The dissenting appellate opinion chastised Wilde's counsel for its "egregious" and "sleazy" tactics of asking irrelevant deposition questions about breast augmentation surgery and plaintiff's job as a topless dancer. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2003 WI App 175 ¶¶ 26, 266 Wis. 2d 659, 679-80, 668 N.W.2d 798, 807-08. Judge Fine listed numerous other examples of how *Wilde's* conduct, rather than that of plaintiff, drove up the cost of litigation.

659, 679-80, 668 N.W.2d 798, 807-08. In each instance, it was the *defendant's* serial unsuccessful motions, obstructionist conduct, and refusal to settle early that actually drove up the price of litigation. *Id.* Defendant also made wholesale denials from the outset; Wilde's answer reveals that it admitted only two of the 47 allegations in the complaint, even denying that co-defendant Thompson was a Wilde manager. (R. 7, ¶ 1: Answer).

The trial court's criticism of plaintiff for "overpleading" and "overtrying" the case is especially ironic where Wilde denied allegations relating to each of those claims, forcing plaintiff to prove *everything*. (*Id.*) Likewise, Wilde vigorously resisted providing certain discovery, which it eventually produced only when compelled to do so. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2003 WI App 175 ¶¶ 26, 266 Wis. 2d 659, 679-80, 668 N.W.2d 798, 807-08.

While defendant has a right to put plaintiff to her proof on every aspect of the case, it should not be heard to complain later

when it is time to pay fees. One federal appellate court explained this principle as follows:

> The [plaintiff's] counsel did not inflate this small case into a large one; its protraction resulted from the stalwart defense. And although defendants are not required to yield an inch or to pay a dime not due, they may by militant resistance increase the exertion required of their opponents and thus, if unsuccessful, be required to bear the cost.

McGowan v. King, Inc., 661 F.2d 48, 51 (5th Cir. 1981).

In *Henson v. Columbus Bank & Trust Co.*, 770 F.2d 1566, 1575 (11th Cir. 1985), the Eleventh Circuit Court of Appeals stated:

> [Defendant] has spiritedly contested [plaintiff's] claims at every stage, including the reasonableness of his petition for attorneys' fees. While [defendant] is entitled to contest vigorously [plaintiff's] claim, once it does so it cannot then complain that the fees should be less than claimed because the case could have been tried with less resources and with fewer hours expended.

This court should expressly adopt the lodestar method and clarify the procedure courts should use in calculating attorney's fees under fee-shifting statutes in Wisconsin. Once a prevailing plaintiff's counsel has submitted evidence of hourly rate and a detail of the time spent litigating the case, this is the presumed

appropriate attorney's fees to be awarded. If a defendant challenges the fees as unreasonable, it should specify what work performed allegedly was unnecessary or unreasonable under the circumstances.

Likewise, the court must make specific findings to justify increasing or decreasing the fees, which should mirror the evidence submitted. The court must advise the parties specifically what course of action was unreasonably taken or what legal work was unnecessary. If, for example, defendant has already admitted an element of a claim in its answer, it would not be necessary for plaintiff to spend time proving up that aspect of the case. If that plaintiff then spent a lot of time discovering something already admitted or not reasonably calculated to lead to the discovery of admissible evidence, the court could properly deduct fees relating to that time. However, when defendants vigorously deny basic allegations and require plaintiffs to prove every aspect of the case, plaintiffs should not be penalized for doing what they are legally required to do to remain in court -- regardless of the size of the case.

Here, the opinion that the case was "overtried" was apparently based upon the modest size of the case. Although the discovery referee offhandedly mused that the fault underlying discovery problems were "a horse apiece," (R. 128; Transcript of 5/13/02 Fee Hearing: 18:13), he did not cite specific examples of anything that would warrant diminishing plaintiff's claim for fees or correspond them to amounts plaintiff requested. Instead, the discovery referee focused on the amount in controversy, stating that he had never seen a "$6,000 case grow barnacles the way this one has." (R. 128; Transcript of 5/13/02 Hearing: 12:7-8). And, because the trial court did not analyze the issue, it apparently agreed that where there is only a small amount in controversy, counsel should not spend much time on the case.

The fallacy of this reasoning is that, in order to prevail, plaintiff must prove every element of her case, whether for a $6,000 case or a $60,000 case. Plaintiffs do not get a "pass" on the requirements of proof simply because the amount at issue is not substantial. If plaintiff fails to prove any element, she will

lose on the merits. If, as here, a defendant files a motion for summary judgment, plaintiff cannot sit back and fail to meet that challenge simply because the case is only worth a few thousand dollars. Under the reasoning in *Kolupar*, however, if counsel spends time developing the proof needed to prevail (especially where, as here, a recalcitrant defendant denies everything and refuses to make discovery), plaintiff risks being compensated for only a fraction of the attorney's fees incurred. This result runs contrary to the purpose and reason behind fee-shifting statutes in consumer protection cases.

III. The Legislature Intended to Shift Fees From A Successful Consumer to A Defendant Violating the Law, Especially In Modest Cases.

Consumer cases typically do not involve relatively large amounts of money. The claim might be for a security deposit that a landlord wrongfully refuses to return -- or money paid for a timeshare sold under illegal and deceptive practices. A case might involve a defective refrigerator or magazines sold through an illegal, high-pressure telephone pitch or misrepresentations relating to home improvement services. In each of these

instances, amounts at issue are relatively small -- perhaps only a few hundred or, at most, a few thousand dollars. Indeed, the Wisconsin Consumer Act *only* applies to transactions valued at less than $25,000. *See* § 421.202(6), Wis. Stats. Transactions worth more than this amount are excluded from the Wisconsin Consumer Act, and thus from fee-shifting provisions under the Act.

The legislature recognized that the only way consumers who fell prey to deceptive and fraudulent practices could vindicate their rights was to provide payment of their attorney's fees, if they prevailed. *See, e.g., First Wisconsin National Bank v. Nicolaou*, 113 Wis. 2d 524, 335 N.W.2d 390 (1983) (Wisconsin Consumer Act); *Shands v. Castrovinci*, 115 Wis. 2d 352, 340 N.W.2d 506 (1983)(unfair trade practices under § 100.20(5), Wis. Stats.); *Hughes v. Chrysler Motors Corp.*, 197 Wis. 973, 542 N.W.2d 148 (1996)(lemon law). The legislature intended to fairly compensate consumers for their attorney's fees in relatively modest cases. *See, e.g., Shands*, 115 Wis. 2d at 358, 340 N.W.2d at 509.

The need for this Court to address this issue is underscored by the lack of uniformity in how attorney's fees are awarded in fee-shifting cases. In *Kolupar*, the trial court failed to analyze the question of reasonableness, instead focusing on the amount in controversy as the barometer of how much fees were appropriate. Clearly, *Kolupar* misunderstands the proper analysis. However, other branches of Milwaukee Circuit Court have reviewed this issue and provided insight into how fee-shifting cases are to be reviewed by a trial court. Recently, in a consumer protection case, Judge Michael Sullivan underscored the necessity of not reviewing fee shifting claims based upon "value of the case":

> The fact that the plaintiffs did not receive a financial windfall as a result of their judgment in this case is not, of itself, the determining factor in assessing reasonable attorney's fees. That's part of the reason the statutes grant attorney's fees in these types of cases. Otherwise the recovery would not justify the cost and sharp dealing condominium developers would be able to prey on unsophisticated purchasers by placing them in the dilemma of having a victorious lawsuit cost the purchaser more than their recovery in the lawsuit itself. Better to let the developers beware: deal fairly and legally with people or pay the consequences, including attorney's fees.

Pliss v. Peppertree Resort Villas, Inc., Milwaukee Case No. 01-CV-4514, *affirmed*, 2003 WI App 102, 264 Wis. 2d 735, 663 N.W.2d 851 (6/6/2002 Decision and Order, attached in Amicus Appx.).[3]

Judge Sullivan specifically addressed the misguided analysis that attorney's fees should be discounted when the amount in controversy is minimal. Indeed, Judge Sullivan's post-appeal opinion further addresses the truth about consumer cases and reveals the critical reasons why the award of fees in consumer cases cannot be dependent upon the amount in controversy:

> [J]ust because the dispute was over a relatively small amount of money does not mean that little time was needed to defend the appeal. Often times,

---

3 Peppertree was the predecessor corporation to (amicus) Fairfield Resorts, who has quoted from a circuit court opinion to impugn the motives of counsel bringing fee-shifting claims. That opinion and argument, like *Kolupar*, underscores the misunderstanding of circuit courts of the application of fee-shifting statutes and the need for the Wisconsin Supreme Court to provide guidance. As Fairfield Resorts admitted in its motion (and as the court can take judicial notice from a review of cases filed on the Circuit Court Access Program), Peppertree and its affiliates have been sued numerous times not only by the State of Wisconsin, but by individual litigants for its widespread violations of consumer laws.

> cases of this nature involve legal issues more complicated than the so-called "big money" cases. Consumer cases where the amount at issue is relatively low in dollars are exactly the kinds of cases where courts must be careful not to disincline plaintiffs and their lawyers from pursuing recovery. If plaintiffs won't recover any money because their court awards are swallowed up in attorneys' fees, then most won't sue, and the businesses that engage in sharp practices will win by literally spending the plaintiffs out of court. Moreover, lawyers won't want to spend the time mounting a proper defense if their clients are of modest means and won't be able to pay them from the court awards. The result will be that a law, which is supposed to benefit consumers and regulate business practices, won't accomplish those goals. Courts should avoid rendering such a law a nullity.

Id., (6/18/2003 Decision and Order in post-remand proceedings; attached in Amicus Appx.). Judge Sullivan is absolutely correct.

IV. *Kolupar* Has Enormous Practical Consequences For Consumers and Other Litigants Who Bring Cases Under Fee-Shifting Cases.

Unfortunately, if attorneys know they will not be fairly compensated -- or if the way they litigate cases is unreasonably truncated based upon the value of the case -- they will not represent people with consumer and other modest fee-shifting

claims. As this court expressly recognized in *Shands*, "[w]hile attorneys generally are willing to perform pro bono legal services in appropriate cases, ...practical considerations limit the number of such suits." *Shands*, 115 Wis. 2d at 358, 340 N.W.2d at 509.

Under *Kolupar,* consumers will be discouraged from bringing claims at all. They will have difficulty attracting competent counsel, or their counsel will require sizeable retainers up-front in order to be assured payment for their fees. At some point, if a defendant stonewalls in a case long enough, plaintiffs without substantial resources may be forced to simply give up, because they cannot to afford to pursue their legitimate, if modest, claims. *Kolupar* creates an incentive for defendants simply to refuse to settle and to out-spend and out-last plaintiffs. It effectively closes the courthouse doors to those without considerable resources.

Consumer protection statutes with fee-shifting provisions are meant to be self-enforcing. Litigants who bring such cases

act as "private attorneys general," enforcing not only their rights, but the rights of everyone.

> [T]he tenant who sues under the [unfair trade practices] statute acts as a "private attorney general" to enforce the tenants' rights set forth in the administrative regulations. Thus, the individual tenant not only enforces his or her individual rights, but the aggregate effect of individual suits enforces the pubic's rights.

Id.

If private litigants cannot redress their rights, this will be left to the State, which will have to hire scores more assistant attorneys general to enforce administrative regulations and civil statutes.

Kolupar also discourages settlement of disputes. Many consumer cases involve fraud and other intentional conduct that give rise to a potential for punitive damages. Indeed, the Wisconsin Consumer Act expressly permits punitive damage awards under the Act. § 425.301(1), Wis. Stats. Thus, even in a $6,000 case, a defendant's exposure might be substantially higher, if punitive damages are awarded. Defendants who settle do not pay punitive damages; they pay some compromised

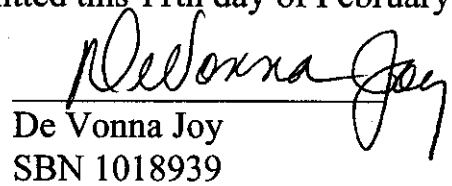
amount. However, some plaintiffs may be reluctant to settle for a lesser amount if worried that they must go all the way to verdict and win large damage awards in order to have their fees paid.

Conversely, settlements will be encouraged if fee-shifting provisions are properly enforced. Defendants, recognizing that they risk ultimately paying a higher price if they pursue frivolous defenses or use "scorched earth" tactics, will have an incentive to honestly evaluate claims and defenses and proceed accordingly. They will still be able to mount a vigorous defense where a plaintiff does not have a meritorious claim. This is because fee-shifting provisions require plaintiffs to prevail. However, defendants will not be rewarded for denying basic allegations when true, unreasonably resisting discovery, or using "Rambo" tactics designed to frustrate the process and drive up the price of litigation. They will be more inclined to settle early where settlements are appropriate.

Conclusion

This court should: 1) reverse the decision of the court of appeals; 2) expressly adopt the lodestar method; and 3) provide guidance to courts and practitioners on how to apply this method.

Respectfully submitted this 11th day of February, 2004.



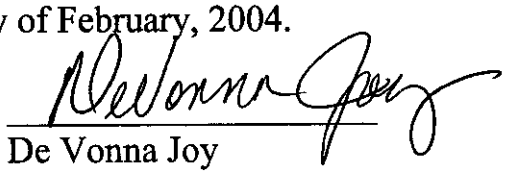
De Vonna Joy
SBN 1018939
Consumer Justice Law Center
P.O. Box 51
Big Bend, WI 53103-0051
(262) 662-3982

Gwendolyn G. Connolly
SBN 1022125
Law Office of Gwendolyn G. Connolly
826 N. Plankinton, Suite 600
Milwaukee, WI 53203
(414) 347-9988

Form Length and Certification

I hereby certify that this brief of amicus curiae conforms to the rules contained in § 809.19(b) and (c)(2) of the Wisconsin Statutes for a brief produced with a proportional serif font. The length of this brief is 2997 words.

Dated this 11th day of February, 2004.



De Vonna Joy
SBN 1018939
Consumer Justice Law Center
P.O. Box 51
Big Bend, WI 53103-0051
(262) 662-3982

Appendix of Amicus Curiae

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DAVID PLISS and
LORENE PHELPS,

Plaintiffs,

vs.

Decision and Order on Attorneys' Fees
Case No. 01-CV-004514

PEPPERTREE RESORT VILLAS, INC.,
PEPPERTREE RESORTS, LTD.,
PATTI STEVENS a
nd JAMES WILEY,

Defendants.

The plaintiffs, victorious by default in this "time share" ownership suit, ask for an award of $14,380.00 in attorneys' fees and costs of $283.45. The defendants oppose that amount as unreasonable. I agree with the plaintiffs for the reasons stated below and award them the fees and costs they request.

First, this case was vigorously litigated, despite the fact that a default judgment was eventually entered. The defendants missed the deadline for answering the complaint. But when the plaintiffs brought on a motion for default judgment based on those untimely answers, the result was a contested hearing supported by briefs and affidavits for both sides. The court file is roughly two inches thick with submissions from the parties. In fact, there were three contested court hearings, including one for finding the default, one for assessing the damages, and one for determining the

attorneys' fees.

Second, the work done by plaintiffs' counsel was good lawyering, not over lawyering. For example, the defendants complain about the discovery served along with the complaint. As members of a profession often criticized because its final product "takes too much time", we should applaud and reward early commencement of the discovery process. The fact is, the sooner discovery is complete, the sooner the lawsuit is ready for disposition. The plaintiffs properly assumed the defendants would timely answer this complaint, as they had others. It isn't the fault of the plaintiffs that the defendants didn't answer in timely fashion. The plaintiffs' lawyers did their job and the plaintiffs should not be punished because some of the work turned out to be unnecessary because the defendants failed to file their answers on time.

The defendants claim much of the paperwork filed by the plaintiffs was simply purloined from other - similar - cases filed for other plaintiffs by these lawyers. Well, cases may be similar, but they are none of them the same. These time share cases involve a relatively new area of law in Wisconsin. The lawyers who represent these plaintiffs are skilled, thorough practitioners. I believe them when they say they had to assess the facts of this case independently of others of a similar nature. Their rates fairly represent their experience and expertise. Moreover, the entire amount of the fee is not excessive, given the work they had to do get to the bottom line. The fact that the plaintiffs did not receive a financial windfall as a result of their judgment in this

case is not, of itself, the determining factor in assessing reasonable attorney's fees. That's part of the reason the statutes grant attorney's fees in these types of cases. Otherwise the recovery would not justify the cost and sharp dealing condominium developers would be able to prey on unsophisticated purchasers by placing them in the dilemma of having a victorious lawsuit cost the purchases more than their recovery in the lawsuit itself. Better to let the developers beware: deal fairly and legally with people or pay the consequences, including attorney's fees.

The defendants argument and submissions on the attorney fee issue amount to so much nitpicking. This court has reviewed the plaintiffs' lawyers' affidavits for fees and finds the time spent fair and reasonable. Moreover, the rate they charge is their standard rate and within the range of what lawyers charge in southern Wisconsin. The plaintiffs request for attorneys' fees of $14,380.00 and costs of $283.45 is hereby approved.

It is **SO ORDERED**.

Dated: **June 6, 2002**

By the Court:

Michael P. Sullivan
Circuit Judge

Circuit Court Chambers

Branch No. 26
Courthouse
Milwaukee, Wisconsin 53233

Michael P. Sullivan
Circuit Judge
414 278-4500

Candace Grossman
Court Reporter

Patricia J. Roberson
Deputy Clerk

June 18, 2003

Atty. Mary Catherine Fons
500 South Page Street
Stoughton, WI 53589

Atty. De Vonna Joy
P.O. Box 51
Big Bend, WI 53103-0051

Atty. Ian A.J Pitz
One South Pinckney Street
P.O. Box 1806
Madison, WI 53701-1806

RE: ***David PLISS et al. v. PEPPERTREE RESORT VILLAS et al.***
Case #01-CV-004514

Dear Counsel,

Please accept this letter as the court's decision on the attorney fee issue argued this past Monday. I agree with the plaintiffs and grant their motion for the attorneys' fees in the amount requested. I rule this way for several reasons.

First, Ms. Fons and Ms. Joy have been quite thorough in chronicling the time they spent on this appeal and I believe they spent every minute they claim they did and that the time spent was necessary for them to successfully defend the appeal.

Second, just because the dispute was over a relatively small amount of money does not mean that little time was needed to defend the appeal. Often times, cases of this nature involve legal issues more complicated than the so-called "big money" cases. Consumer cases where the amount at issue is relatively low in dollars are exactly the kinds of cases where courts must be careful not to disincline plaintiffs and their lawyers from pursuing recovery. If plaintiffs won't recover any money because their court awards are swallowed up in attorneys' fees, then most won't sue, and the businesses that engage in sharp practices will win by literally spending the plaintiffs our of court. Moreover, lawyers won't want to spend the time mounting a proper case if their clients are of modest means and won't be able to pay them from the court awards. The result will be that a law, which is supposed to benefit consumers and regulate business practices, won't accomplish those goals. Courts should avoid rendering such a law a nullity.

Third, the defendants have not established by any evidence that the plaintiffs' fee claims are excessive in this case. Instead, they cite to this court other cases where fee requests were lowered as proof that the plaintiffs' lawyers engage in a practice of charging excessive fees. This judge is not swayed by those cases. If the defendants wish to challenge plaintiffs' fee claims, they must do so in a more direct fashion, submitting specific evidence as to why – *in this case* – the time claimed was not necessarily spent.

What concerns the court here is that the defendants' arguments over fees create a potential "Catch-22" situation for plaintiffs' lawyers. If they try their cases using sufficient time, effort and zeal to reign victorious, then they face a claim of "over trial", resulting in a possible lowered attorney's fee award. But if they don't expend that same time, effort and zeal, they risk losing on the merits. That is a predicament in which courts should avoid placing plaintiffs lawyers in cases such as this one.

Counsel for the plaintiffs shall prepare and submit the appropriate order under the local five-day rule.

Yours truly,

M. P. Sullivan

Michael P. Sullivan

IN THE SUPREME COURT OF WISCONSIN

TAMMY KOLUPAR,

Plaintiff-Appellant-Petitioner, Appeal No. 02-1915

v. Trial Court Case No. 00-CV-2571

WILDE PONTIAC CADILLAC, INC. and
RANDALL THOMPSON,

Defendants-Respondents.

AMICUS BRIEF IN SUPPORT OF TAMMY KOLUPAR

Appeal From The Milwaukee County Circuit Court
The Honorable Thomas R. Cooper Presiding

Mary Catherine Fons
SBN 1017000
Fons Law Office
500 South Page Street
Stoughton, WI 53589
(608) 873-1270

Jeff Scott Olson
SBN 1016284
The Jeff Scott Olson Law Firm, S.C.
131 W. Wilson St., #1200
Madison, WI 53703-3225
(608) 283-6001

Judy Tomczak
SBN 1028190
Tomczak Law Office, LLC
5835 Tree Line Drive
Madison WI 53711
(608) 277-5525

Edward W. Harness
SBN 1030509
Consumer Guardian Group
P.O. Box 171012
Milwaukee, WI 53217-8092
(414) 461-7293

Table of Contents

Table of Authorities

Cases

Statutes/Administrative Codes

Introduction

This is a consumer protection case. However, there is much more at stake than the ability of the individual consumer in this case -- or even consumers generally -- to obtain justice. This case has broad implications for not only all other consumer protection cases, such as lemon law cases, and deceptive trade practices cases, but all "fee-shifting" cases generally. These include housing, employment, and civil rights cases, and many more sorts of litigation that the law seeks to encourage through fee-shifting provisions. This case not only affects the ability of individuals to obtain monetary redress; it impacts, for example, whether a family will become homeless because they cannot hire a lawyer to fight a discriminatory eviction, whether a worker will be able to fight an illegal repossession of his or her car, whether an elderly homeowner will be able to fight predatory lending practices, and more.[1]

---

1 Some examples of other statutes affected by the attorney fee decision in this case are unfair and deceptive trade practices statutes (§§ 100.171 – 100.18, 100.20), Wisconsin's motor vehicle lemon law (§ 218.015), all actions under the Wisconsin Consumer Act (§ 425.308), and timeshare

The Court of Appeals opinion in this case is a disturbing blueprint for future cases, and it essentially guts fee-shifting statutes. The purposes of fee-shifting statutes are achieved when the court is required to award a predictable fee. The undersigned join Ms. Kolupar in urging this Court to reverse the decision on fees.

I. Trial Courts Must Comply With Fee-Shifting Provisions To Assure Access To The Courts In Furtherance Of Legislative Purposes And Policy Interests.

In *Shands v. Castrovinci,* 115 Wis. 2d 352, 340 N.W.2d 506 (1983), the Wisconsin Supreme Court enunciated the reasons the legislature includes fee shifting provisions in consumer protection and other statutes:

> First, the recovery of double damages and attorney fees encourages injured tenants to bring legal actions to enforce their rights under the administrative regulations. Often the amount of pecuniary loss is small compared with the cost of litigation. Thus, it was necessary to

---

law violations (§ 707.57(1)(b)). There are a multitude of other Wisconsin statutes that include reasonable attorney fee shifting provisions for enforcement purposes. Just a few examples include: Open Meetings (§ 19.37(2)(a)); Housing Discrimination (§ 101.22(6m)); Fair Dealership Law (§ 135.06); Wisconsin's Organized Crime Control Act (§ 946.87(4)); and the Wisconsin Privacy Act (§ 895.50(1)).

make the recovery large enough to give tenants an incentive to bring suit. The award of attorney fees encourages attorneys to pursue tenants' claims where the anticipated monetary recovery would not justify the expense of legal action. While attorneys generally are willing to perform pro bono legal services in appropriate cases, we recognize that practical considerations limit the number of such suits.

Second, the tenant who sues under the statute acts as a "private attorney general" to enforce the tenants' rights set forth in the administrative regulations. Thus, the individual tenant not only enforces his or her individual rights, but the aggregate effect of individual suits enforces the public's rights.

Third, tenant suits have the effect of deterring impermissible conduct by landlords because, if they violate the administrative regulations, they will be subject to double damages and will be responsible for costs, including attorney fees. The deterrent effect of the statute strengthens the bargaining power of tenants in dealing with landlords.

Finally, in an amicus brief the Wisconsin Department of Justice noted that private tenants actions provide a necessary backup to the State's enforcement powers under sec. 100.20, Stats. The department pointed out that the sheer number of violations prevent it from proceeding against all violators. Private tenant actions thus constitute an enforcement mechanism reinforcing that of the justice department.

A tenant action brought under sec. 100.20(5), Stats., is not successful until he or she has actually recovered damages and attorney fees.

Shands v. Castrovinci, 115 Wis. 2d 352, 358-59, 340 N.W.2d 506 (1983).

Tammy Kolupar acted as a private attorney general to enforce consumer protection laws against Wilde Pontiac Cadillac after she fell prey to fraudulent and deceitful business practices. She did this pursuant to the directive of Congress and the Wisconsin legislature, both of which enacted laws regulating the automobile sales industry with fee-shifting provisions. Tammy Kolupar was able to fulfill the directives to enforce the laws because she was fortunate enough to locate lawyers who were both *competent* to represent consumers against businesses that engage in these types of practices and *willing* to go forward on the basis of the law's promise of a reasonable fee award to a prevailing party.

Unfortunately, due to the trial court awarding Tammy Kolupar approximately 10% of the attorney fees incurred in a case spanning more than two years, and the Court of Appeals precedential stamp of approval on this award, the next person who falls prey to such practices is

much less likely be able to find a lawyer willing to take the risk of relying on a court to make a fair award of fees. If this court does not reverse the fee decision, access to the courthouse will be denied to many of those who follow Tammy Kolupar. Unless courts are required to make predictable, not arbitrary, fee awards, competent counsel will not be able to risk taking fee-shifting cases.

Consumer protection laws and other laws with fee-shifting provisions attached, are meant to be self-enforcing. *Hughes v. Chrysler Motors Corp.*, 197 Wis. 2d 973, 981, 542 N.W.2d 148 (1996) ("lemon law"). The fee-shifting provisions level the playing field so that individuals are able to prosecute claims against multi-million dollar businesses. "These corporations not only have the wealth and will to exhaust an individual litigant, but also control vast amounts of technical expertise on the very mechanical aspects the consumer is challenging. Without the sweetener of double damages in a sufficient amount and reasonable attorneys' fees, few consumers would bring such actions." (*Id.* at 983)

Attorney fee awards must be sufficient to reasonably compensate attorneys representing successful plaintiffs. The fees are intended to encourage attorneys to assist in the private prosecution of consumer law violations. *Reusch v. Roob*, 2000 WI App 76, ¶ 36, 234 Wis. 2d 270, 292, 610 N.W.2d 168. (2000) (Wisconsin Consumer Act). If Wisconsin trial courts do not comply with the laws that mandate *reasonable* attorney fee awards in private attorney general actions, individuals with claims will not be able to prosecute the wrongdoers because lawyers cannot afford to take these cases if they know they will not get paid.

If individuals are not able to prosecute wrongdoers, then the state agencies charged with public enforcement of the same laws (e.g. Department of Transportation for Ch. 218; Department of Justice for Wisconsin Consumer Act, Chs. 421-427) will need to hire scores of new lawyers at taxpayer expense to ensure that the laws are enforced in Wisconsin. Legislatures

ensure payment for *private* enforcement comes from the wrongdoers via fee-shifting provisions.

II. It Was An Erroneous Exercise Of Discretion To Apply A Proportionality Test.

Both Judge Cooper and Mr. Crivello expressed concerns about the amount of attorney fees and costs incurred in proportion to the dollar amount of the settlement, and adjusted the award due to this factor, thereby erroneously applying a proportionality test to make the award. Judge Cooper first expressed:

> ...Judge Crivello was appointed by Judge Malmstadt, who was a good choice.
> He can tell me as my representative and give me his opinion as to whether these are reasonable fees. I mean, $53,000.00 on 6,000 case -- $6,000.00 case certainly raises some concern with the Court, and I am interested to see what Judge Crivello has to say. So Frank, come on up.

(R. 128; Fee Hearing: 9:11-21)

Mr. Crivello then made the recommendation for a total award of $15,000.00 and explained:

> Just to put my recommendation into some context, this is a case which would ultimately settle for, I understand, $6,600.00.

> This is just barely above a small claims case. . . This was a two-person transaction for an automobile.

(R. 128; Fee Hearing: 87:12-20). The trial court then adopted Mr. Crivello's recommendation in total. (R.129; Fee Hearing: 73:13-21).

The United States Supreme Court has soundly rejected "proportionality" as the basis for a fee award. *City of Riverside v. Rivera*, 477 U.S. 561, 574-80 (1986), and this Court should do the same. Fee awards in civil rights and consumer protection matters regularly exceed the plaintiff's recovery. *See e.g.*, *City of Riverside*, 477 U.S. at 580 (awarding $245,450 fees on a $33,350 recovery); *Grant v. Martinez*, 973 F.2d 96, 101(2d Cir. 1992)(fee award of $500,000 on $60,000 settlement); *Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 725-26 (8th Cir. 1978) ($14,000 fees on a $3,690 recovery in odometer fraud case); *Perez v. Perkiss*, 742 F. Supp. 883, 888-92 (D. Del. 1990) (over $10,000 in fees on a $1,200 recovery); *Tolentino v. Friedman*, 46 F.3d 645, 653 (7th Cir.), cert. denied, 115 S.Ct. 2613

(1995) (district court ordered to increase fee award upward from $10,132.50 on a $1000 recovery: "Congress provided fee shifting to enhance enforcement of important civil rights, consumer-protection, and environmental policies. By providing competitive rates we assure that attorneys will take such cases, and hence increase the likelihood that the Congressional policy of redressing public interest claims will be vindicated"); *Armstrong v. Rose Law Firm*, 2002 WL 31050583 (D. Minn. 2002) ($43,180.00 in fees on a $1,000.00 recovery); *Estate of Borst v. O'Brien*, 979 F. 2d 511, 517 (7th Cir. 1992) (fee award 47 times plaintiffs' recovery not unreasonable).

"In determining an appropriate attorney's fee, we have rejected mechanical rules which call on a court simply to compare the amount demanded and the amount recovered because federal anti-discrimination law vindicates important public interests which may not be

reflected in the size of a particular recovery. See, e.g. *Zagorski v. Midwest Billing Services*, 128 F. 3d 1164, 1166 (7th Cir. 1997); *Hyde v. Small*, 123 F. 3d 583, 585 (7th Cir. 1997)." *Connolly v. National School Bus Service,* 177 F. 3d 593 (7th Cir. 1999).

Wisconsin has not and must not adopt a proportionality test for attorney fee awards. Fee awards must be reasonable in light of the amount of work required by the particular case. When enacting statutes containing fee shifting provisions, the legislature created a mechanism for effective representation for individuals. If the amount of fees which an individual can recover is capped by an arbitrary standard of proportionality, individuals will not be able to fully prosecute their claims. Large companies will always be able to outspend the individual in the litigation up to and beyond the point of the arbitrary fee limit, secure in the knowledge that they are not incurring incremental fee liability. A defendant could then present a stalwart defense that causes the plaintiff to have to spend as much time

prosecuting a case for $1,000 in damages as one for $10,000 or $100,000. Unless a full reasonable fee award is required, the purposes of fee shifting legislation will be defeated.

III. It is Not A Proper Consideration That A Defendant Has To Pay Its Own Lawyer.

The trial court justified awarding plaintiff a fraction of her attorney's fee, in part, by the fact that the defendant Wilde Toyota already had to pay its own lawyer for defending the case. On this point, the trial court stated:

> The flip side is Wilde has to swallow whatever fees they have. *I think that establishes what the statute intended by the fee-scheduling statute.*

(R. 129; Fee Hearing: 73:22-23)(emphasis supplied).

The trial court was wrong. The defendant's sadness at having to write a check to its own lawyer may deter it from future violations, but this deterrence is not the only or even the primary purpose behind the fee-shifting provisions in civil and consumer rights legislation. That purpose is to create an incentive for

lawyers to represent victims, so that deserving litigants can find competent counsel. *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989). That a defendant has to pay its own lawyers is immaterial to this purpose, and this central goal of fee-shifting is seriously undermined when courts send the message that defendants who litigate every case to the wall and concomitantly increase their own legal fees can thereby *decrease* rather than increase the plaintiff's fee award, thus *decreasing* the incentive for lawyers to take on such cases in the future.

IV. Courts Should Not Defer Discretion To Third Parties And Fee Awards Must Have An Evidentiary Basis.

As the dissenting opinion by Judge Fine points out, the trial court did not independently exercise its discretion, but instead deferred to the opinion of the discovery referee, who lacked an evidentiary foundation for that opinion. (Ct. App. Decision ¶ 27). As the discovery referee testified, he was involved in the case only four of the 26 months the case had been pending at

the time of the fee hearing, and his interaction with counsel was limited to that four months. (R. 128; Fee Hearing: 11:19-24)

Mr. Crivello was unfamiliar with the history of settlement negotiations in the case, with Ms. Kolupar's attempts to settle, with Wilde's refusal to settle until two years into the case, and with basic procedural history of the case. (R. 128; Fee Hearing: 46:5-21; 49:23-25; 44:4-6). His dearth of knowledge extended even to the discovery abuses for which he was supposedly proffering an opinion on "fault" of the parties: Wilde's failure to produce documents. (R. 128; Fee Hearing: 25:5-16 & 18-25; 28:13-19)

The trial court originally justified calling Mr. Crivello to advise the court "whose fault it is and who is the cause of the -- the cost of the discovery," (R. 128; Fee Hearing: 9:6-7). However, Mr. Crivello's role went far beyond proffering testimony on whether one party or another was "at fault" in discovery disputes; he essentially decided the value of Attorney Erspamer's

services. It was error for the trial judge to simply rubber-stamp the opinion of Mr. Crivello on a matter as to which the discovery master lacked both the foundation and the statutory authority to act. After the testimony was finished, Judge Cooper simply adopted Mr. Crivello's recommendation, stating:

> The long and short of it, it comes down to-- I appreciate Judge Crivello's recommendation. I think it's appropriate. I happen to concur with it.

(R. 129; Fee Hearing: 73:13-15)

The transcript is bereft of any indication that the trial judge reviewed the record, considered the time plaintiff's counsel spent on various tasks, made any specific factual findings (or any consideration regarding whether undertaking any particular task was unreasonable), or analyzed the factors articulated by the Supreme Court in considering the reasonableness of attorney's fees. Instead, the discovery referee arbitrarily picked a number out of thin air to award for fees, and Judge Cooper, without any making any findings of his own, simply adopted this number.

The Supreme Court should provide guidance to trial courts and appellate courts about the appropriate means of applying the law in fee-shifting cases. If judges are permitted to pick a number arbitrarily without making specific factual findings that are tied to the record -- or to lower the fees based upon a proportionality standard -- or to delegate that responsibility to a third party unfamiliar with the entire court record -- the goal behind fee-shifting statutes is thwarted.

V. A Fee-Shifting Analysis Should Not Penalize Plaintiff Where, As Here, *Defendants'* Conduct Drives Up The Price Of Litigation.

Although the discovery referee offhandedly mused that the fault behind the discovery problems were "a horse a piece," (R. 128; Fee Hearing: 18:13), he did not cite specific examples of anything that would warrant diminishing plaintiff's claim for attorney's fees. Moreover, the record reveals that it was primarily Wilde's conduct that ratcheted up fees. Judge Fine, in his dissenting opinion, cites many specific examples. (Ct. App. Decision ¶ 26)

The most flagrant example of Wilde's misconduct was described by Judge Fine as follows:

> An egregious, and sleazy, example of the Rambo tactics Wilde used is that Wilde's lawyer deposed one of Kolupar's friends about Kolupar's employment as a topless dancer and Kolupar's desire to have breast augmentation implant surgery.

(Id.)

Judge Fine is absolutely correct; under no stretch of the imagination can these questions have any relation to anything reasonably discoverable about automobile fraud or any issue in this case. They were clearly employed to embarrass and harass the plaintiff. These discovery abuses *by Wilde* exemplify the hardball, "scorched earth" tactics employed *by the defense*, which unnecessarily increased fees.

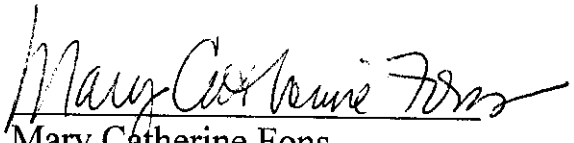
In making a determination of the reasonable fees, the Court should instruct the lower courts to consider these factors relating to defendants' conduct and *how they drove up the costs of litigation.* Failure of a trial court even to consider defendants' conduct or to hold

defendants accountable for its "egregious," "sleazy," "Rambo" tactics creates a windfall to the defendants and encourages this rank misconduct in litigation. Similarly, in this case, the trial court did not identify specific instances of supposed improper conduct on the part of the plaintiff that would justify diminishing fees. Instead, the court simply adopted the arbitrary $15,000 figure suggested by Mr. Crivello, and awarded plaintiff approximately 10% of the fees that her counsel undisputedly incurred.

Conclusion

The lodestar method of determining fees, coupled with the application of factors articulated by the Wisconsin Supreme Court and fee-shifting statutes, is the proper means of awarding fees. An award cannot be arbitrary or without foundation. This Court must provide sorely needed guidance to courts and litigants practicing in this area.

Respectfully submitted this 10th day of February, 2004.



Mary Catherine Fons
SBN 1017000
Fons Law Office
500 South Page Street
Stoughton, WI 53589
(608) 873-1270

Jeff Scott Olson
SBN 1016284
The Jeff Scott Olson Law Firm, S.C.
131 W. Wilson St., #1200
Madison, WI 53703-3225
(262) 283-6001

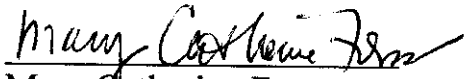
Judy Tomczak
SBN 1028190
Tomczak Law Office, LLC
5835 Tree Line Drive
Madison WI 53711
(608) 277-5525

Edward W. Harness
SBN 1030509
Consumer Guardian Group
P.O. Box 171012
Milwaukee, WI 53217-8092
(414) 461-7293

Certification

I certify that this brief conforms to the rules contained in §§ 809.19(1) and (4) and 809.81 for a brief produced using the following font:

> Proportional serif font: double-spaced, left and right margins are 2 inches and top and bottom margins are 1 inch. The length of the brief is 2,996 words.



Mary Catherine Fons
SBN 1017000
Fons Law Office
500 South Page Street
Stoughton, WI 53589
(608) 873-1270

IN THE SUPREME COURT OF WISCONSIN

Trial Court Case No. 02-CV-2571

TAMMY KOLUPAR,

Plaintiff-Appellant, Petitioner

Circuit Court Case No. 00-CV-2571
v. **Appeal Case No. 02-~~1951~~** 1915

WILDE PONTIAC, CADILLAC, INC. and RANDALL THOMPSON,

Defendants-Respondents.

BRIEF AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANTS PETITIONER SUBMITTED BY THE CONSUMER LAW LITIGATION CLINIC - UNIVERSITY OF WISCONSIN LAW, THE WISCONSIN DEPARTMENT OF JUSTICE, AND THE WISCONSIN COALITION FOR ADVOCACY, INC.

Judge Thomas R. Cooper
Milwaukee County Circuit Court
Case No. 02-CV-2571

Submitted by:

Stephen E. Meili
State Bar ID No. 01018029

Marissa Santiago
Law Student

Consumer Law Litigation Clinic
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 263-6283

Peg Lautenschlager
Cynthia Hirsch
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857
(608) 266-1792

Mitchell Hagopian
State Bar ID No. 1000181
Wisconsin Coalition For Advocacy, Inc.
16 North Carroll St., Suite 400
Madison, Wisconsin 53703
(608) 267-0214

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

WISCONSIN STATUTES

OTHER AUTHORITIES

ISSUES TO BE DISCUSSED BY AMICUS CURIAE

The Consumer Law Litigation Clinic of the University of Wisconsin Law School ("CLLC"), the State of Wisconsin Department of Justice ("DOJ"), and the Wisconsin Coalition for Advocacy ("WCA") will discuss the following issue: whether the Court of Appeals decision is consistent with this Court's controlling authority on fee-shifting statutes because of the emphasis it places on the relationship between damages and attorney's fees.

STATEMENT OF THE CASE

The CLLC, DOJ, and WCA agree with Plaintiff-Appellant's Statement of the Case.

INTEREST OF THE AMICI IN THIS CASE

The CLLC researches and advocates issues of concern to consumers, particularly those with limited resources, speaks out on behalf of under-represented groups, and pursues their interests through administrative, legislative, and judicial means. The CLLC, through the non-profit Center for Public

Representation, Inc. and its successor the Economic Justice Institute, Inc., has filed briefs amicus curiae in numerous other cases where the issues raised were of widespread importance to consumers throughout the State of Wisconsin. Because fee-shifting statutes are integral to the effective enforcement of Wisconsin's consumer protection statutes, including the statute at issue in this case, the issues presented for review are of special interest to the CLLC.

The DOJ is an agency of the State of Wisconsin that has the statutory authority to enforce Wisconsin's consumer protection laws. The DOJ has an interest in this matter because private consumer protection actions provide a necessary backup to the state's enforcement powers. The large number of consumer protection action violations prevents DOJ from proceeding against all violations.

The WCA is a statewide, private, nonprofit agency. It works on legal issues facing Wisconsin citizens with disabilities and frequently advances legal claims that involve fee-shifting statutes. The fees WCA generates from this work are used to supplement the limited financial resources WCA

receives from government and private agencies. In many of the cases WCA litigates under these statutes, the amount of monetary damages won is small in comparison to the amount of time its lawyers must expend to win them. Tying fee awards to damages will significantly diminish indigent people's access to legal services from WCA.

SUMMARY OF ARGUMENT

The Court of Appeals decision should be reversed because it permits an award of attorney's fees to be limited by the amount of damages recovered by a prevailing party. If left to stand, the Court of Appeals decision creates confusion among trial courts when they analyze petitions for attorney's fees under fee-shifting statutes. And by tethering fees to the amount of damages, it will discourage attorneys from representing consumers in cases where the monetary loss is relatively slight. These results are antithetical to this Courts' longstanding jurisprudence on fee-shifting statutes.

ARGUMENT

I. THE COURT OF APPEALS DECISION REPRESENTS A DEPARTURE FROM THIS COURT'S CONTROLLING AUTHORITY ON FEE-SHIFTING STATUTES AND IS INCONSISTENT WITH THE UNDERLYING PURPOSES OF THOSE STATUTES

If permitted to stand, the Court of Appeals decision will significantly weaken the effectiveness of attorney's fee statutes in Wisconsin. It will create confusion among trial court judges about how to analyze attorney fee petitions. And it will deter many attorneys from representing consumers and other individuals whose rights have been violated but who have suffered relatively modest financial loss. As such, the Court of Appeals decision contravenes the underlying purpose of attorney's fee provisions, which is to assist consumers in bringing legitimate - but relatively modest - claims that they might not otherwise be able to bring. And if such claims can no longer be brought, many of Wisconsin's most important consumer protection statutes will go largely unenforced.

This Court has consistently articulated the importance of fee-shifting statutes in allowing individuals to bring claims

that would otherwise not be brought. In *First Wisconsin National Bank v. Nicolaou*, 113 Wis. 2d 254, 335 N.W. 2d 390 (1983), this Court rejected the trial court's reduction of an attorney fee request under the Wisconsin Consumer Act and noted that:

> To a large extent the Wisconsin Consumer Act depends upon private lawsuits for its enforcement. Ordinarily, however, the amount of damages flowing from a WCA violation is insufficient to make it economical for a consumer to initiate legal action. Indeed, the cost of legal representation will often exceed the recovery in a WCA case. However, WCA actions frequently present important legal questions for both the consumer and the creditor which bear on the public policy of consumer protection. The potential impact of these cases over the long run induces creditors to litigate them to the fullest. The result being that, in the absence of sufficient attorney fee awards, consumers will be financially unable to maintain meritorious claims. By the same token, the prospect of only a meager fee for a great deal of work will make WCA actions unattractive to attorneys. In short, the policies of the WCA will not be effectively carried out through private enforcement unless adequate attorney fees are awarded to prevailing consumers.
>
> 113 Wis. 2d at 538-39.

Indeed, this Court has underscored the importance of attorney fee awards to prevailing plaintiffs even where the plaintiff has received free legal representation. In *Shands v. Castrovinci*, 115 Wis. 2d 352, 340 N.W. 2d 506 (1983), this Court reversed the court of appeals' denial of a fee petition in a landlord-tenant case and noted several public policy justifications for the fee-shifting provision of Wis. Stat.

§100.20:

> First, the recovery of double damages and attorneys fees encourages injured tenants to bring legal actions to enforce their rights under the administrative regulations.
>
> Second, the tenant who sues under the statute acts as a "private attorney general" to enforce the tenants' rights set forth in the administrative regulations. Thus the individual tenant not only enforces his or her individual rights, but the aggregate effect of individual suits enforces the public's rights.
>
> Third, tenant suits have the effect of deterring impermissible conduct by landlords because, if they violate the administrative regulations, they will be subject to double damages and will be responsible for costs, including attorneys fees . . .
>
> Finally, in an amicus brief the Wisconsin Department of Justice noted that private tenants actions provide a necessary backup to the state's enforcement power.

115 Wis. 2d at 358.

One of the principles underlying this Court's jurisprudence on attorney's fees is that the amount of damages at issue in the case (or recovered by the prevailing plaintiff) should not dictate the size of the attorney fee award. While the amount of damages is one of several factors the Court should consider in weighing a fee request, it should not be the sole or even the dominant factor. In *Nicolaou*, this Court awarded $20,462.66 in attorney's fees to prevailing plaintiffs

who recovered $5,193.08 in damages:

> [T]he fact that the fees claimed exceed the recovery does not alone indicate that the fees are unreasonable. As previously noted, the recovery obtained in a WCA case is often far exceeded by the legal costs. The trial court gave too much weight to the amount recovered in reducing the fee award to $8,500. This factor must be liberally construed and applied in accordance with the other relevant factors.
>
> 113 Wis. 2d at 541

Similarly, in *Clark v. Aetna Finance Corp.*, 115 Wis. 2d 581, 340 N.W. 2d 747 (Ct. App. 1983), the Court of Appeals rejected the trial court's focus on the relationship between the attorney fee request and the size of the judgment in a case alleging violations of the Wisconsin Consumer Act: "The fact that the plaintiff's attorney's fees may equal or exceed the recovery awarded is not a manifest injustice to the defendant warranting a reduction in the fees awarded". 115 Wis. 2d at 591, citing *Nicolaou.*

This Court has recognized the importance of not limiting attorney fee awards by the amount of damages in contexts beyond consumer protection. For example, in *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 340 N.W.2d 704 (1983), this Court upheld a $23,000 attorney fee

award to a plaintiff in a civil rights case under 42 USC § 1983. This Court reversed the trial court's reduction of the fee, holding that the award of attorney's fees should not be denied simply because only one person was favorably affected by the result in the case. *Id.* at 313. Helping one person, this Court reasoned, is consistent with Congress' purpose in authorizing fee-shifting by statute, given the "importance of the substantive rights implicated." *Id.*

The Court of Appeals decision below flies in the face of this precedent. The decision makes several references to the amount at issue in the case and its relationship to the attorney fee request submitted by the plaintiff, while offering little or no analysis of the other relevant factors enumerated in SCR: 20:1.5. Specifically, the Court of Appeals quoted the discovery referee appointed to the case who noted, among other things, the following:

> In thirty years in [the] practice of law, as well as fifteen years as a circuit judge myself[,] I have never seen a $6,000 case grow barnacles the way this one has.
> . . .
> The only case that I have seen that approached this magnitude was . . . a multi-million dollar insurance case with fifteen defendants, including one British defendant
> . . .
> . . .
> This was a two-person transaction for an automobile.

> . . .
> and I don't think this case is worth much more than [$]15,000 in fees.
>
> (Ct. App. Decision, ¶7).

The implication of the Court of Appeals decision is that if a case is not "worth" very much in dollar terms (which begs the question of how such worth is calculated), the plaintiff's attorney who litigates it should not receive very much in attorneys fees, either. In addition to ignoring the many factors to be considered under SCR 20:1.5, this reasoning has grave implications for *all* fee-shifting statutes in Wisconsin. First, as this Court noted in *Nicolaou*, it is not unusual for a proper attorney fee award to exceed the amount recovered in many cases that raise important legal issues. Consumer cases are often "small" in dollar terms, but are nevertheless important to the consumer involved, as well as the larger public. If not for reasonable attorney fee awards disconnected to the "worth" of the case, most consumers would be unable to file such cases.

Moreover, the Court of Appeals decision gives a green light to defendants to engage in delaying and abusive

litigation tactics without fear of being responsible for the plaintiff's costs in opposing them. As Judge Fine notes in his dissent:

> The trial court also justified its minimal award of attorney fees to Kolupar because "[t]he flip side is Wilde has to swallow whatever fees they have." Neither the trial court nor the Majority cites any authority for this startling proposition - that a rich defendant can frustrate at every turn a poor plaintiff's quest for justice and then say when the fee-shifting day of reckoning has arrived, "I have substantial attorneys fees myself, I shouldn't also have to pay the plaintiff's."
>
> (Ct. App. Decision, ¶31(Fine, J., dissenting)

The result of this court-sanctioned abuse (aptly termed "scorched-earth Rambo litigation policy" by Judge Fine. *Id.* at ¶23) is that many consumers, particularly those with limited finances, will be forced to abandon their claims mid-stream, since their attorneys know that they have little chance to recover even a majority of their fees. Such an outcome turns the underlying purpose of attorney's fees statutes on its head and will leave Wisconsin's consumer protection statutes unenforced.

II. THE COURT OF APPEALS DECISION IS INCONSISTENT WITH CONTROLLING FEDERAL CASE LAW ON FEE-SHIFTING STATUTES.

The Court of Appeals decision is also at odds with controlling federal jurisprudence on attorney's fees including that of the United States Court of Appeals for the Seventh Circuit. For example, in *Hodgson v. Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972), the Seventh Circuit recognized that limiting attorney's fees to the amount recovered would discourage private enforcement of employment rights. The three plaintiffs in *Hodgson* sought to recover back wages, liquidated damages and attorney's fees under the Fair Labor Standards Act, 29 U.S.C. § 216. The district court awarded the plaintiffs a combined amount of approximately $24,000 in back pay and $20,000 in attorney's fees. *Id.* at 223. The defendant disputed this fee award because it nearly exceeded the plaintiff's damages. *Id.* at 228. The Seventh Circuit rejected this argument and held:

> The amount of damages recovered is only one factor to be considered in arriving at a reasonable fee award. To hold otherwise would in reality prevent individuals with relatively small claims from effectively enforcing their rights and protecting the interest of the public in having

> equal pay for equal work. Employees exercising their rights under the Equal Pay Act are benefiting not only themselves but also the general pubic as well.

Id. at 228-29. *See also*, In *Wales v. Jack M. Berry, Inc.*, 192 F. Supp. 2d 1313 (MD Fla. 2001) (district court allowed a plaintiff who recovered $21,000 in back pay for a defendant's violation of the Fair Labor Standards Act to recover $352,000 in attorney's fees.)

Similarly, in *In re Pine*, 705 F.2d 936 (7th Cir. 1983), the Seventh Circuit held that the amount of attorney's fees should not be limited by the amount of damages in a case under the Truth in Lending Act, 15 U.S.C. § 1640. One of the issues on appeal in *Pine* was whether the award of $2,000 in attorney's fees was disproportionately large in comparison to the $1,000 at stake in the litigation. The Seventh Circuit held that the intent of TILA, which mandates attorney's fees to successful plaintiffs, was not to base fees solely upon the amount of damages. *Id.* at 938. The court reasoned that rigidly linking attorney's fee awards to the amount of damages would deter plaintiffs from filing cases under TILA. *Id.* Further, the court held the intent of having an attorney fee

provision is "to compensate the attorney out of the assets of the violator so that the net damages recovery of the victim will not be diminished to pay his legal expenses." *Id.* at 939.

The Seventh Circuit has taken a similar approach in copyright cases. In *Rockford Map Publishers, Inc. v. Directory Service Co. of Colorado, Inc.*, 768 F.2d 145 (7th Cir. 1985), the plaintiff claimed that the defendant used the plaintiff's map as a template without the plaintiff's permission. The plaintiff recovered $250 in actual damages and obtained an injunction to prevent the company from distributing the works that had used his map as a template. *Id.* at 147. The Seventh Circuit upheld the district court's award of $22,000 in attorney's fees. *Id.* at 150. Rejecting the defendant's argument that the actual damages awarded were very low, the court reasoned that the injunction was worth much more in terms of its intangible value for the plaintiff and for the individual employee who had developed it. *Id.*

In addition to employment, consumer protection and copyright cases, the Seventh Circuit has awarded significant attorney's fees in civil rights cases where the monetary

damages were minimal. In *Estate of Borst v. O'Brien*, 979 F.2d 511 (7th Cir. 1992), a case involving excessive police force, the Seventh Circuit affirmed an attorney's fee award of $47,000 for a plaintiff who was awarded $500 in compensatory damages and $500 in punitive damages. *Id.*, at 513. And, in *Lac Du Flambeau Band of Lake Suprerior Chippewa Indians, et al., v. Stop Treaty Abuse-Wisconsin, Inc.*, 41 F.3d 1190 (7th Cir. 1994), a case where the only relief was injunctive, the Seventh Circuit awarded attorney's fees of $159,000 for trial work and $82,000 for the appeal. *Id.*at 1194.

In sum, it is well settled that an attorney's fee award should not be limited by the damages recovered by the plaintiff. The Court of Appeals decision below is contrary to this precedent. If left to stand, it would force Wisconsin attorneys to take cases based solely on the amount of damages involved. This would be a grave injustice, for it would close the courthouse door to plaintiffs with meritorious yet financially modest claims, and would deter private enforcement of important Wisconsin statutes.

CONCLUSION

For the reasons stated above, the Consumer Law Litigation Clinic, the Wisconsin Department of Justice, and the Wisconsin Coalition for Advocacy urge the Court to reverse the decision of the Court of Appeals

Respectfully submitted this 11th day of February, 2004.

Stephen E. Meili
State Bar No. 1018029

Marissa Santiago
Law Student

Consumer Law Litigation Clinic
University of Wisconsin Law School
975 Bascom Mall
Madison, Wisconsin 53706
(608) 263-6283

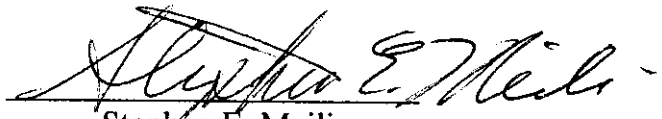
Peg Lautenschlager
Cynthia Hirsch
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857
(608) 266-1792

Mitchell Hagopian
State Bar ID No. 1000181
Wisconsin Coalition For Advocacy, Inc.
16 North Carroll St., Suite 400
Madison, Wisconsin 53703
(608) 267-0214

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 16 pages and 2716 words.

Dated this 11th day of February, 2004



Stephen E. Meili

STATE OF WISCONSIN
SUPREME COURT

TAMMY KOLUPAR,

Plaintiff-Appellant-Petitioner,

v.

Appeal No. 02-1915

Trial Court Case No. 00-CV-2571

WILDE PONTIAC CADILLAC, INC. and
RANDALL THOMPSON,

Defendants-Respondents.

BRIEF OF AMICUS CURIAE LEGAL ACTION OF WISCONSIN

APPEAL FROM THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE THOMAS R. COOPER PRESIDING

Colleen D. Ball
State Bar ID No. 1000729
Appellate Counsel, S.C.
714 Honey Creek Parkway
Wauwatosa, WI 53213
414-881-4888

Jeffrey R. Myer
State Bar ID No. 01017339
Litigation Director
Legal Action of Wisconsin
230 West Wells, Room 800
Milwaukee, WI 53203
414-278-7722

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

Legal Action of Wisconsin is a not-for-profit law firm with offices located in Milwaukee, Madison, Green Bay, Oshkosh, LaCrosse, Racine, and Dodgeville. It provides legal representation to low-income people in 39 counties in Wisconsin. People with incomes at 125% of the federal poverty line are eligible for Legal Action's services. Over 468,000 people in Legal Action's territory meet this criterion.

Each year, Legal Action closes more than 500 consumer matters and 1,300 matters involving private landlord-tenant disputes. State fee-shifting provisions such as the Wisconsin Consumer Act, Wis. Stat. § 100.20 (unfair competition and trade practices), and the rules promulgated by the Wisconsin Department of Agriculture, Trade and Consumer Protection provide the primary protection for low-income consumers and tenants. Due to limited funding, Legal Action must refer many consumer law and housing law cases to private attorneys, who accept them because state fee-shifting statutes offer the possibility of recovering a reasonable fee for their work.

Legal Action is concerned about the court of appeals's decision in this case because it approved a fee award under a Wisconsin fee-shifting statute based largely on an impression of how much the case was worth. The decision thwarts the very purpose of fee-shifting statutes, which are designed to encourage attorneys to pursue small claims that individually might not justify the cost of litigation but in the aggregate enforce the public's interest. Toward this end, Legal

Action urges the Wisconsin Supreme Court to clarify that when awarding fees under a state fee-shifting statute, the circuit court must first compute the lodestar figure (reasonable hours times a reasonable rate), then presume that the lodestar figure represents a reasonable fee award, and finally, if necessary, adjust the figure according to the factors in SCR 20:1.5.

ARGUMENT

I. This Appeal, Boiled Down, Concerns the Proper Method for Calculating Attorney's Fees Under a Wisconsin Fee-Shifting Statute.

This appeal stems from Kolupar's request for $53,000 in attorney's fees and costs incurred to recover $6,600 in damages for a violation of Wis. Stat. § 218.01 (1993-94). The parties' briefs-in-chief and recent motions to supplement the record leave the impression that the dispute is about whether Kolupar's attorney unnecessarily inflated litigation costs with excessive pleadings and discovery, or whether Wilde Pontiac employed a Rambo-style defense strategy that forced Kolupar's attorney to spend substantial time on the case. These are fact questions, and from Legal Action's perspective, they miss the fundamental error in both the circuit court's and the court of appeal's decisions.[1] The heart of the matter is the

[1] An appellate court reviews a trial court's decision to award fees for an erroneous exercise of discretion. The trial court exercises its discretion erroneously when it fails to: (1) examine the relevant facts, (2) apply the proper legal standard or (3) use a rational process to reach a reasonable conclusion. *Village of Shorewood v. Steinberg*, 174 Wis. 2d 191, 204, 496 N.W.2d 57 (1993). While the circuit court may have failed in all three respects, the Supreme Court's decision is important because it will establish the legal standard and the rational process that a circuit

method that the circuit court used to determine that Kolupar was entitled to only $15,000 in attorney's fees and the reasoning that the court of appeals employed to affirm that fee award.

The trial judge acknowledged that he had no "thumbnail or formula" for calculating fees under a fee-shifting statute. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2003 WI App. 175 ¶ 7, ¶17, 266 Wis. 2d 659, 668 N.W.2d 798. The judge was "absolutely certain" that Kolupar's lawyer put in "exactly the amount of time on this case that he says," but made no effort to determine how many of the hours spent were reasonable or to establish a reasonable rate for the services provided. The judge allowed a discovery referee (not a fee referee), to recommend an appropriate award. Based on personal impressions—not evidence from the parties—the discovery referee asserted: "I don't think this case is worth much more than $15,000 in fees. Although I know both sides spent a lot more time than that." *Id.* at ¶ 7. The trial judge adopted the discovery referee's assessment and concluded: "Reasonable attorney's fees in my mind are $15,000." *Id.* at ¶ 17.

In reviewing this decision, the court of appeals neglected to pinpoint the legal standard that the trial judge actually applied or should have applied when calculating attorney's fees under a fee-shifting statute. Instead, the court of appeals held that, in assessing fees, the trial judge might consider whether: (a) costs could have been

---

court must undertake when calculating attorney's fees under Wisconsin fee-shifting statutes.

avoided by a reasonable and prudent effort; (b) the final judgment is out of proportion to the attorney's fees generated; and (c) the verdict justifies the amount of money expended. *Id.* at ¶ 16. The court also held that "SCR 20:1.5 lists additional factors that ***may*** help a trial court determine the reasonableness of an attorney's fee." *Id.* (Emphasis supplied).[2] According to the court of appeals, the trial judge properly considered many of the SCR 20:1.5 factors to reach the $15,000 fee award. *Id.* at ¶ 17.

In truth, none of the excerpts from the trial judge's ruling mention or apply SCR 20:1.5 or any of its factors. Consequently, the court of appeals's published decision suggests that there is no particular formula for calculating reasonable attorney's fees under a fee-shifting statute, that a trial judge may assess fees based upon his impression of "what the case is worth," and that SCR 20:1.5 provides additional (but optional) considerations. In short, the court of appeals sanctioned an amorphous, subjective approach to fee calculation.

II. Federal Courts Use the Lodestar Method to Calculate Fees Under Federal Fee-Shifting Statutes.

Federal courts have, for decades, grappled with the issues presented by this case, and they have developed a systematic approach to the computation of a "reasonable" attorney fee called the lodestar method. A brief review of lodestar method's evolution shows why,

---

[2] The court of appeals relied on *Aspen Services, Inc. v. IT Corp.*, 220 Wis. 2d 491, 583 N.W.2d 849 (1998), a case that involved a contractual claim for attorney fees rather than a fee-shifting statute aimed at encouraging smaller claims that might not justify the cost of litigation.

despite some criticism, it remains the best way to calculate a fee award under a federal (or state) fee-shifting statute.

According to the "American rule," parties to litigation bear their own costs and attorney fees. There are, however, several exceptions to this rule. One exception is the common fund doctrine, which allows a person who pursues a lawsuit that yields a fund in which others have a common interest to recoup litigation expenses from that fund. Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 241 (3d Cir. 1986). For a while, a second exception was the "private attorney general" doctrine, which permitted federal courts to grant attorney fees to individuals who initiated litigation aimed at vindicating important public policies. *Id.* In 1975, the United States Supreme Court ruled that courts could use the "private attorney general" rationale only in situations where Congress had enacted a statutory fee-shifting provision. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 269-270 (1975). Over the next several decades, Congress passed numerous such statutes, including the Civil Rights Attorney's Fees Awards Act of 1976. *Court Awarded Attorney Fees*, 108 F.R.D. at 241-242.

These exceptions to the "American rule" spawned frequent petitions for attorney fees, which federal courts decided based primarily upon the amount recovered. *Id.* at 242. Searching for a more structured, objective methodology, the Third Circuit Court of Appeals established the "lodestar method." *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*,

487 F.2d 161, 167-168 (3d Cir. 1973)(*Lindy I*); and *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976)(*Lindy II*). With this method, a court determines the number of hours that counsel reasonably expended on the litigation in question and multiplies that number by a reasonable hourly rate for the attorney's services. The product represents the "lodestar," which can be increased or decreased for various reasons. *Court Awarded Attorney Fees*, 108 F.R.D. at 243. Shortly after *Lindy I*, the Fifth Circuit Court of Appeals adopted a somewhat different approach, which required district courts to consider twelve factors when computing a reasonable fee award. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).[3]

About one decade later, the United States Supreme Court endorsed a hybrid of *Lindy* and *Johnson*. Under fee-shifting statutes, federal courts were to begin by determining the lodestar (reasonable hours x reasonable fees) and then adjust that amount upward or downward based upon the twelve factors outlined in *Johnson*.

---

[3] The twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974).

Hensley v. Eckerhart, 461 U.S. 424, 430 n.3, 434 n.9 (1983). After *Hensley*, the United States Supreme Court stressed that the lodestar figure is more than a mere "rough guess" as to the final fee award; it is presumed to be a reasonable fee. *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564 (1986). The presumption that the lodestar figure represents a "reasonable fee" is significant because it advances the rationale behind fee-shifting statutes—enabling private parties to find a lawyer who will litigate violations of certain laws based on the statutory assurance that she will recover a "reasonable fee. *Id.*, 478 U.S. at 565.

In 1986, a Third Circuit Task Force studied the lodestar method and criticized its use in common fund cases, where the goal is to spread the fee among all parties who benefit from the fund. *Court Awarded Attorney Fees*, 108 F.R.D. at 250. But the task force specifically recommended that the lodestar method remain in use for statutory fee cases, noting that it provided "some degree of objectivity and predictability to the fee-shifting process." *Id.* at 259. The United States Supreme Court has confirmed that even today the lodestar figure remains the "guiding light" of federal fee-shifting jurisprudence. *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002).

III. The Wisconsin Supreme Court Should Clarify that Circuit Courts Must Start with the Lodestar Figure When Calculating a Fee Award Under a State Fee-Shifting Statute.

Shortly after the United States Supreme Court decided *Hensley*, the Wisconsin Supreme Court reviewed a fee award in a federal civil rights case filed in state court. *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 340 N.W.2d 704 (1983). While not explicitly using the term "lodestar," the *Thompson* court appeared to follow the *Hensley* hybrid methodology of first determining a reasonable rate multiplied by a reasonable number of hours, adjusted up or down according to the *Johnson* factors. Thereafter, Wisconsin courts have consistently employed the *Hensley* approach for federal civil rights claims brought in state courts. *See e.g., Bialk v. Milwaukee County*, 180 Wis. 2d 374, 381, 509 N.W.2d 334, (Ct. App. 1993) ("the court should utilize the 'lodestar' as its starting point in determining the fee award . . . [t]his number can then be adjusted up or down according to the twelve factors adopted by the Supreme Court in *Hensley*."); *Paradinovich v. Milwaukee County*, 189 Wis. 2d 184, 192, 525 N.W.2d 325 (Ct. App. 1994) (acknowledging use of lodestar figure for a 42 U.S.C. § 1988 claim); *Hartman v. Winnebago County*, 208 Wis. 2d 552, 572-573, 561 N.W.2d 768 (Ct. App. 1997), *rev'd on other grounds*, 216 Wis. 2d 419, 574 N.W.2d 222 (1998); *Crawford v. Masel*, 2000 WI App 172, 238 Wis. 2d 380, 617 N.W.2d

188 (reviewing and applying *Hensley* and its progeny to attorney fee claim under 42 U.S.C. § 1988).[4]

Wisconsin courts have also approved a *Hensley*-type analysis for the calculation of fees under state fee-shifting provisions. *See e.g., Standard Theatres, Inc. v. Wisconsin Dep't of Transp.*, 118 Wis. 2d 730, 349 N.W.2d 661 (1984). In *Standard Theatres*, which involved a state condemnation statute, the Wisconsin Supreme Court affirmed an attorney fee award arrived at after: (1) an evidentiary hearing, (2) a detailed review of affidavits describing the attorney's time and the going rate for legal services in that community, and (3) consideration of the factors outlined in the Supreme Court rules. *Id.*, at 750 n.9 (quoting SCR 20:12(2) now contained in SCR 20:1.5). Since then, Wisconsin courts have used this same methodology in an assortment of state fee-shifting cases. *Village of Shorewood v. Steinberg*, 174 Wis. 2d 191, 204, 496 N.W.2d 57 (1993) (using *Standard Theatre*'s approach for fee claim under state condemnation statute); *Hughes v. Chrysler Motor Corporation*, 188 Wis. 2d 1, 16-21, 523 N.W.2d 197 (Ct. App. 1994), *aff'd* 197 Wis. 2d 973, 542 N.W.2d 148 (1996) (using similar approach for fee claim under Wisconsin's lemon law); *Board of Regents of Univ. of Wisconsin System v. Wisconsin Pers. Comm'n*, 147 Wis. 2d 406, 411-13, 433 N.W.2d 273 (Ct. App. 1988)

[4] For state cases involving federal civil rights claims, Wisconsin courts use the federal standards governing fee calculation. *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 308 n..6, 340 N.W.2d 704 (1983).

(implicitly adopting *Hensley* analysis for fee claim under state whistleblower statute).[5]

Although these Wisconsin statutory fee-shifting cases have the look and feel of the *Hensley* approach to calculating a reasonable fee award, there are subtle distinctions between them and their federal counterparts.[6] The Wisconsin cases do not, for instance, expressly adopt the lodestar method of fee calculation for state fee-shifting statutes. They do not explicitly instruct lower courts that the starting point for determining a reasonable fee is to multiply the number of hours reasonably expended by a reasonable hourly rate. And they do not make clear that the product of a reasonable rate and reasonable hours expended is ***presumed*** to be a reasonable fee. This lack of clarity may explain why, in Kolupar's case, the circuit court and the court of appeals tried to justify a $15,000 fee award without any reference to the number of hours reasonably expended on this case or a reasonable rate for the legal services provided by Kolupar's attorney.

---

[5] This short summary of state fee-shifting cases excludes *First Wisconsin Nat'l Bank v. Nicolaou*, 113 Wis. 2d 524, 335 N.W.2d 390 (1983) because it involved a request for fees under a statute which expressly provided that the amount of fees shall be "sufficient to compensate attorneys representing customers in actions arising from consumer transactions" and directed the trial court to consider the factors now contained in SCR 20:1.5. *Id.* at 530 n.7. The fee-shifting statutes in the cases above do not contain these explicit guidelines for calculating a "reasonable" attorney fee.

[6] *See also, Wisconsin Retired Teachers Ass'n v. Employee Trust Fund Board*, 207 Wis. 2d 1, 38, 558 N.W.2d 83 (1997), where the Supreme Court awarded fees under the common fund doctrine and gave the circuit the option of calculating fees using either a percentage of the fund recovered or the lodestar method.

The Wisconsin Supreme Court should pointedly reject the "what's the case worth" method of determining reasonable attorney fees. The court of appeals's rationale and its reliance on *Aspen Services, Inc. v. IT Corp.*, 220 Wis. 2d 491, 583 N.W.2d 849 (Ct. App. 1998) are especially incompatible with the public functions served by fee-shifting statutes in consumer cases having small monetary stakes. First, fee shifting encourages private enforcement and supplements limited public resources. *See e.g., First Wisconsin Nat'l Bank v. Nicolauo*, 113 Wis. 2d 524, 538-539, 335 N.W.2d 390 (1983)(the cost of legal representation will often exceed the recovery in a WCA case; the policies of the WCA will not be carried out through private enforcement unless adequate attorney fees are awarded to prevailing consumers); *Shands v. Castrovinci*, 115 Wis. 2d 352, 358, 340 N.W.2d 506 (1983) (fee award under residential housing regulations encourages attorneys to pursue claims where anticipated recovery will not justify expense of legal action). Second, fee awards deter illegal practices. Some prohibited practices, such as not accounting for security deposits are profitable if the only loss is a small sum in the few cases where the wrongdoer is "caught" through litigation. Third, the threat of a fee award encourages settlement in cases where the defendant's statutory violation is apparent. These three public functions—enforcement, deterrence, and settlement—are served by the lodestar method and disserved by the "what's the case worth" rationale.

CONCLUSION

This appeal is not about whether Kolupar's attorney unnecessarily ran up litigation costs. It is about the procedure the trial judge used to evaluate this assertion and calculate a reasonable fee. The lodestar method, properly employed, guides the trial court's analysis of fee claims in cases that are "over-pled" or "over-tried." *See e.g., Quaratino v. Tiffany & Co.*, 166 F.3d 422, 425-26, n.6 (2d Cir. 1999)(lodestar method requires use of "billing judgment" to avoid spending unnecessary time, but trial court erred in departing from lodestar method). Accordingly, the Wisconsin Supreme Court should reverse the court of appeals's decision and direct lower courts to calculate fees under Wisconsin fee-shifting statutes by: (a) calculating the lodestar figure; (b) presuming that the lodestar figure represents a reasonable fee award; and (c) allowing some adjustment of the lodestar according to the factors in SCR 20:1.5.

Dated this 10th day of February, 2004.

Jeffrey R. Myer
WI State Bar No. 01017339
Litigation Director
Legal Action of Wisconsin
230 West Wells Street, Rm. 800
Milwaukee, WI 53203
414-278-7722

Colleen Ball

Colleen D. Ball
WI State Bar No. 1000729
Appellate Counsel, S.C.
714 Honey Creek Parkway
Wauwatosa, WI 53213
414-881-4888

Attorney for Legal Action of Wisconsin

STATE OF WISCONSIN
SUPREME COURT

TAMMY KOLUPAR,

Plaintiff-Appellant-Petitioner,

v.

Appeal No. 02-1915

Trial Court Case No. 00-CV-2571

WILDE PONTIAC CADILLAC, INC. and
RANDALL THOMPSON,

Defendants-Respondents.

FORM AND LENGTH CERTIFICATION

I hereby certify that the brief of *amicus curiae* Legal Action of Wisconsin conforms to the rules contained in Section 809.19(8)(b) and (c)(2) of the Wisconsin Statutes for a brief produced with a proportional serif font. The length of this brief is 2,994 words.

Dated this 10th day of February, 2004.

Jeffrey R. Myer
WI State Bar No. 01017339
Litigation Director
Legal Action of Wisconsin
230 West Wells Street, Rm. 800
Milwaukee, WI 53203
414-278-7722

Colleen Ball

Colleen D. Ball
WI State Bar No. 1000729
Appellate Counsel, S.C.
714 Honey Creek Parkway
Wauwatosa, WI 53213
414-881-4888

Attorney for Legal Action of Wisconsin

STATE OF WISCONSIN
SUPREME COURT

TAMMY KOLUPAR,

Plaintiff-Appellant-Petitioner,

v. Appeal No. 02-1915

Trial Court Case No. 00-CV-2571

WILDE PONTIAC CADILLAC, INC. and
RANDALL THOMPSON,

Defendants-Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2004, I served copies of the brief of *amicus curiae* upon counsel listed below, by first class mail, to the following addresses:

Paul R. Erspamer, Esq.
Lisko & Erspamer, S.C.
W229 N1433 Westwood Drive
Waukesha, WI 53186-1183
Attorney for Tammy Kolupar

Philip L. Atinsky, Esq.
Atinsky, Kahn, Sicula & Peper
135 West Wells, Suite 604
Milwaukee, WI 53203
Attorney for Randall Thompson

Kathryn S. Gutenkunst
Cramer, Multhauf & Hammes, LLP
P.O. Box 558
Waukesha, WI 53187
Attorney for Wilde Pontiac Cadillac, Inc.

Dated this ____ day of February, 2004.

Colleen D. Ball
WI State Bar No. 1000729
Appellate Counsel, S.C.
714 Honey Creek Parkway
Wauwatosa, WI 53213
414-881-4888

Jeffrey R. Myer
WI State Bar No. 01017339
Legal Action of Wisconsin
230 West Wells Street, Rm. 800
Milwaukee, WI 53203
414-278-7722
Attorney for Legal Action of Wisconsin